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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 351

TERMINAL WAREHOUSE COMPANY, PETITIONER,

vs.

PENNSYLVANIA RAILROAD COMPANY AND MERCHANTS WAREHOUSE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 9, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

INDEX.

	Page
Docket Entries	1
Statement of Claim	8
Stipulation of Counsel for Filing Exhibits	17
Agreement of July 1, 1916 (Pennsylvania Railroad Company and Merchants Warehouse Company)	18
Agreement of July 1, 1916 (Pennsylvania Railroad Company, Lessee, and Merchants Warehouse Company)	29
Indenture of July 1, 1916 (Philadelphia, Baltimore & Washington Railroad Company and Merchants Warehouse Company)	39
Indenture of July 1, 1916 (Pennsylvania Railroad Company and Merchants Warehouse Company)	49
Agreement of January 25, 1917 (Pennsylvania Railroad Company and Merchants Warehouse Company)	59
Agreement of July 3, 1918 (Pennsylvania Railroad Company and Merchants Warehouse Company)	68
Agreement of April 10, 1922 (Pennsylvania Railroad Company and Merchants Warehouse Company)	76
Agreement of March 4, 1925 (Pennsylvania Railroad Company and Merchants Warehouse Company)	82
Agreement of July 28, 1927 (Pennsylvania Railroad Company and Merchants Warehouse Company)	88
Affidavit of Defense in the Nature of a Demurrer of the Pennsylvania Railroad Company to Plaintiff's Statement of Claim	94
Opinion Sur Statutory Demurrer, Dickinson, J.	96
Order Overruling Statutory Demurrers	103
Defendant, Pennsylvania Railroad Company's Exception to Order Overruling Statutory Demurrer	104
Order Granting Exception	104
Defendant, Merchants Warehouse Company's Exception to Order Overruling Statutory Demurrer	105
Order Granting Exception	105
Affidavit of Defense of the Pennsylvania Railroad Company	106
Stipulation of Counsel Amending Paragraph 14 of the Affidavit of Defense of Pennsylvania Railroad Company	116
Affidavit of Defense of Merchants Warehouse Company	117

	Page
Motion Under 28 U. S. C., Sec. 636, to Require Production of Writings on the Trial	118
Affidavit in Support of Motion	120
Answer of Pennsylvania Railroad Company to Motion Under 28 U. S. C., Sec. 636, to Require Production of Writings on the Trial	123
Supplemental Answer of Pennsylvania Railroad Company to Motion Under 28 U. S. C., Sec. 636, to Require Production of Writings on the Trial	128
Opinion Sur Motion Under 28 U. S. C. A., Sec. 636, for Production of Writings on the Trial	129
Defendant, Pennsylvania Railroad Company's Exception to Order Under U. S. C., Sec. 636, for Production of Writings on the Trial	133
Order Granting Exception	134
Bill of Exceptions	135
Evidence on Behalf of the Plaintiff	137
Agreement Dated January 25, 1917	142
Harold Clarke—	
Direct Examination	153
Cross-Examination	155
Re-Direct Examination	155
George M. Richardson—	
Cross-Examination	155
Re-Direct Examination	165
Robert H. Rissinger—	
Direct Examination	166
Ernest V. D. Sullivan—	
Direct Examination	175
Cross-Examination	202
Re-Direct Examination	230
Re-Cross-Examination	232
George M. Dallas—	
Direct Examination	238
Edwin R. Maize, Jr.—	
Direct Examination	239
Cross-Examination	240

Page

D. W. Meredith—
Direct Examination 241
Cross-Examination 242

Edward Knighton—
Direct Examination 242
Cross-Examination 243
Re-Direct Examination 243
Re-Cross-Examination 243

George M. Richardson (Recalled)—
Cross-Examination 244
Re-Direct Examination 245
Re-Cross-Examination 245

Robert H. Rissinger (Recalled)—
Direct Examination 246
Cross-Examination 249

Evidence on Behalf of the Defendants:

Hubert J. Horan—
Direct Examination 251
Cross-Examination 255
Re-Direct Examination 257

George M. Richardson (Recalled)—
Direct Examination 258
Cross-Examination 274
Re-Direct Examination 281
Re-Cross-Examination 282

Edward W. Oescher—
Direct Examination 282
Cross-Examination 286
Re-Direct Examination 289
Re-Cross-Examination 290

Julien L. Eysmans—
Direct Examination 290
Cross-Examination 299
Re-Direct Examination 302

Charles J. Quinn—
Direct Examination 304
Cross-Examination 304

	Page
Alfred Wilkins—	
Direct Examination	305
Milton Freeman—	
Direct Examination	306
Cross-Examination	306
Edwin T. Carpenter—	
Direct Examination	306
Cross-Examination	307
Charles Edwin Webb—	
Direct Examination	308
Cross-Examination	310
Re-Direct Examination	313
F. H. Frick—	
Direct Examination	313
Cross-Examination	314
Edgar P. Brooks—	
Direct Examination	316
Cross-Examination	316
C. L. France—	
Direct Examination	317
Cross-Examination	318
Re-Direct Examination	318
John E. Bowers—	
Direct Examination	319
Cross-Examination	320
W. B. Gheen—	
Direct Examination	320
Cross-Examination	322
George S. Harlan—	
Direct Examination	326
Cross-Examination	327
Harry A. Kelleher—	
Direct Examination	328
Cross-Examination	329
Re-Direct Examination	330
Re-Cross-Examination	331

Page

S. H. Levin—
Direct Examination 331

Charles A. Carey—
Direct Examination 332
Cross-Examination 333
Re-Direct Examination 334

Edwin C. Eckman—
Direct Examination 334
Cross-Examination 335

H. H. McLachlan—
Direct Examination 336
Cross-Examination 337

George F. Malone—
Direct Examination 337

Howard A. Washington—
Direct Examination 338
Cross-Examination 339

Burton Proctor—
Direct Examination 340
Cross-Examination 341

A. Fletcher Sisk—
Direct Examination 342
Cross-Examination 342

George Kenyon—
Direct Examination 343
Cross-Examination 344

George LaCroix—
Direct Examination 344
Cross-Examination 347

Charles W. Mather—
Direct Examination 348
Cross-Examination 349

Charles F. Bonsor—
Direct Examination 349
Cross-Examination 351

	Page
I. H. Nester—	
Direct Examination	351
Cross-Examination	351
Re-Direct Examination	353
John B. Park—	
Direct Examination	353
Cross-Examination	354
Re-Direct Examination	354
James J. Reilly—	
Direct Examination	355
Cross-Examination	356
J. I. Daily—	
Direct Examination	356
Cross-Examination	357
Re-Direct Examination	358
Lloyd V. R. VanNatta—	
Direct Examination	358
Cross-Examination	360
Deane Atmore—	
Direct Examination	360
Cross-Examination	362
C. Herbert Bell—	
Direct Examination	362
Cross-Examination	363
Howard S. Bevan—	
Direct Examination	367
J. L. Webb—	
Direct Examination	367
C. L. France (Recalled)—	
Direct Examination	368
Cross-Examination	368
Re-Direct Examination	369
Re-Cross-Examination	369
Clarence L. Moore—	
Direct Examination	370
Cross-Examination	370

	Page
W. C. Glynn—	
Direct Examination	370
Cross-Examination	372
Ernest V. D. Sullivan (Recalled)—	
Cross-Examination	372
Warren T. Justice—	
Direct Examination	380
Cross-Examination	380
Re-Direct Examination	382
Re-Cross-Examination	385
Evidence on Behalf of Plaintiff in Rebuttal:	
George M. Richardson (Recalled)—	
Cross-Examination	400
Charge of the Court	524
Defendants' Points for Charge	548
Verdict of Jury	555
Order Sealing Bill of Exceptions	556
Order Extending Time for Filing of Motions for New Trial by Defendants	557
Motion and Reasons of the Defendant, Merchants Warehouse Company, for a New Trial	558
Motion and Reasons of the Defendant, the Pennsylvania Railroad Company, for a New Trial	586
Opinion Sur Rule in Arrest of Judgment and for a New Trial	598
Opinion In Re Motion in Arrest of Judgment and Rule for a New Trial Sur Reargument	605
Defendant, the Pennsylvania Railroad Company's Exception to the Refusal of the Court to Grant Its Motion for a New Trial	611
Order	611
Defendant, Merchants Warehouse Company's Exception to the Refusal of the Court to Grant Its Motion for a New Trial	612
Order	612
Motion for Judgment and to Treble Damages	612
Defendants' Answer to Plaintiff's Motion for Judgment and to Treble Damages	613
Defendants' Supplemental Answer to Plaintiff's Motion for Judgment and to Treble Damages	614

INDEX—Continued.

	Page
Supplemental Answer of Defendant, the Pennsylvania Railroad Company, to Plaintiff's Motion for Judgment and to Treble Damages	615
Petition for Allowance of Counsel Fee	616
Defendants' Answer to Petition for Allowance of Counsel Fee	619
Opinion Sur Rule for Judgment for Treble Damages and for Allowance of Counsel Fees	625
Præcipe for Judgment	629
Judgment	629
Defendant, the Pennsylvania Railroad Company's Exception to Order Trebling the Amount of the Verdict and Allowing a Counsel Fee	630
Order	630
Exceptions of the Defendant, Merchants Warehouse Company to Trebling of Damages, Allowance of Counsel Fee, and Entry of Judgment	631
Order	631
Order Extending Time for Presenting and Sealing Bill of Exceptions and Extending Time	632
Order Further Extending Time for Presenting and Sealing Bill of Exceptions and Further Extending Time	633
Supplemental Order Further Extending Time for Presenting and Sealing Exceptions and Further Extending Time	634
Petition for Allowance of Appeal	634
Acknowledgment of Service and Approval of Bond	635
Order Allowing Appeal With Supersedeas	636
Defendants' Assignment of Errors	636
Acknowledgment of Service	651
Præcipe for Record on Appeal	651
Acknowledgment of Service	655
Clerk's Certificate	656

Proceedings in U. S. C. C. A., Third Circuit	657
Minute entry of argument and submission	657
Opinion, Thompson, J.	658
Judgment	666
Clerk's certificate	667
Order allowing certiorari	668

INDEX TO EXHIBITS.

PLAINTIFF'S EXHIBITS.

Ex. No.	Description	Offered Page	Printed Page
1	Several Agreements Between the Pennsylvania Railroad Company or One of Its Subsidiaries and the Merchants Warehouse Company	151	...
2	Excerpts From a Certified Copy of the Pennsylvania Railroad Company's Tariff G. O. I. C. C. No. 14400 and Its Supplements	151	407
3	Pamphlet "Warehouse Facilities of the Pennsylvania System" and Map	155	...
4	Pamphlet Giving Location of Warehouses and Photographs	156	...
5	Advertisement From "Commerce and Industry" (January, 1928)	157	...
6	Full Page Advertisement From Vol. VIII, No. 8, From "Commerce and Industry" (May, 1928)	157	...
7	Letter From Merchants Warehouse Company and Chicago Jewelers Tool Works, Dated June 16, 1928	157	158
8	Letter From Merchants Warehouse Company to George Steere & Sons, Dated June 22, 1928	157	159
9	Letter From Merchants Warehouse Company to Sears, Roebuck & Company, dated September 20, 1928	160	160
10	Photographs of Warehouses	177	...
11	Photographs of Interior and Exterior of Warehouse	178	...
12	Photographs of Interior and Exterior of Warehouse	178	...
13	Receipted Demurrage Bill	185	...

INDEX TO EXHIBITS—Continued.

Ex. No.	Description.	Offered Page	Printed Page
14	Sidetrack Agreement	186	...
15	Letter From the Northwestern Consolidated Milling Co., to Terminal Warehouse Co., Dated June 15, 1928	190	191
16	Letter From A. E. Turner Company to Terminal Warehouse Company, Dated February 10, 1928	191	192
17	Letter From the Bon Ami Company, Inc., to Terminal Warehouse Co., Dated June 22, 1925	193	195
18	Statement in 5 Volumes	234	...
19	Reports Made by Robert H. Rissinger	247	...
20	Reports Made by Robert H. Rissinger	247	...
21	Correspondence Between the Pennsylvania Warehousing and Safe Deposit Company and Philadelphia and Reading Railroad	395	395
22	Photostatic Copies of Bills and Orders Submitted to Interstate Commerce Commission as Exhibits Nos. 90, 91 and 92	405	..

DEFENDANTS' EXHIBITS.

1	Several Agreements and Contracts Between the Pennsylvania Railroad Company and the Merchants Warehouse Company	260	411
2	Advertisement From the "Evening Bulletin" Under Date of June 25, 1931	281	...
3	Memorandum of Agreement Between the Pennsylvania Warehousing & Safe Deposit Company and Baltimore & Ohio Railroad Company	290	416
4	Agreement Between the Philadelphia & Reading Railway Company and the Pennsylvania Warehousing & Safe Deposit Company	290	429
5	Correspondence Between U. S. Railroad Administration and Pennsylvania Railroad Company	297	439

INDEX TO EXHIBITS—Continued.

Ex. No.	Description.	Offered Page	Printed Page
6	Tables of Car Handlings 1927 to 1933	319	443
7	Railroad Tariffs	327	...
8	Railroad Tariffs	327	...
9	Map of Philadelphia With Numerous Warehouses Marked Thereon	385	...
10	Circular Entitled "Unique"	385	...
11	Page of Magazine "Distribution and Warehousing" of September, 1931	385	...
12	Portions of Defendants' Exhibit No. 12	386	451
	Formal Complaint James Gallagher, et al. v. the Pennsylvania Railroad Company	386	451
	Formal Complaint Walter A. Bailey, et al., v. the Baltimore & Ohio Railroad Company	386	457
	Formal Complaint Rex & Company, Inc., et al., v. Reading Company	386	462
	Answer of the Pennsylvania Railroad Company	386	468
	Answer of the Baltimore & Ohio Railroad Company	386	469
	Answer of Reading Company	386	471
	Petition of the Merchants Warehouse Company for Leave to Intervene	386	473
	Order Permitting Intervention	386	475
	Report of Interstate Commerce Commmission	386	476
	Petition of Complainants for Reconsideration of the Conclusions of Division 3	386	486
	Answer of the Pennsylvania Railroad Company	386	500
	Order of Commission	386	512
	Complaint of James Gallagher, et al.	386	513
	Defendant's Answer	386	520
	Order of Commission	386	522
13	Supplemental Agreement Between the Baltimore & Ohio Railroad Company and Pennsylvania Warehousing & Safe Deposit Company	387	387

IN THE

District Court of the United States,

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 16774. March Term, 1932.

TERMINAL WAREHOUSE COMPANY, A CORPORATION,

v.

PENNSYLVANIA RAILROAD COMPANY, A CORPORATION, AND MERCHANTS WAREHOUSE COMPANY, A CORPORATION.

DOCKET ENTRIES.

Mar. 12, 1932.	Præcipe to issue summons filed.
Mar. 12, 1932.	Summons Exit returnable 1st Monday in April 1932.
Mar. 12, 1932.	Statement of claim and notice to file affidavit of defense filed.
Mar. 16, 1932.	Appearance of Barnes, Biddle & Myers, Esqs., for Pennsylvania Railroad Company.
Mar. 17, 1932.	Appearance of M. Hampton Todd, Esq., for Merchants' Warehouse Company filed.
Mar. 17, 1932.	Summons returned "on March 12, service accepted by Pennsylvania Railroad Company on March 15, served Merchants' Warehouse Company"—and filed.

Mar. 26, 1932. Petition by Pennsylvania Railroad Company for rule for more specific statement of claim and Order of Court granting petition, filed—Proceedings to stay.

Mar. 26, 1932. Petition by Merchants' Warehouse Company for rule for more specific statement of claim and Order of Court granting rule, filed—Proceedings to stay.

Mar. 29, 1932. Answer to rule for more specific statement of claim filed.

Mar. 30, 1932. Answer to rule by Pennsylvania Railroad Company, for more specific statement of claim, filed.

Apr. 27, 1932. Stipulation of counsel as to filing of exhibits filed.

Apr. 28, 1932. Statutory Demurrer by Merchants' Warehouse Company filed.

May 2, 1932. Affidavit of defense in nature of demurrer by Pennsylvania Railroad Company, filed.

Oct. 24, 1932. Argued sur demurrer.

Nov. 2, 1932. Opinion, Dickinson, J, ruling questions of law in favor of plaintiff with leave to defendants to file an affidavit of defense to fact averments of statement of claim, filed.

Nov. 10, 1932. Order of Court overruling statutory demurrers and granting leave to file affidavit of defense in fifteen days, filed.

Nov. 23, 1932. Affidavit of defense filed.

Dec. 2, 1932.	Affidavit of defense of Pennsylvania Railroad Company filed.
Dec. 6, 1932.	Præcipe to place case on trial list filed.
June 30, 1933.	Motion to require production of writings at trial filed.
June 30, 1933.	Præcipe to place case on argument list filed.
Aug. 22, 1933.	Answer of Pennsylvania Railroad Co. to motion to require production of writings on the trial filed.
Oct. 18, 1933.	Supplemental answer of defendant to require production of writings on the trial filed.
Oct. 18, 1933.	Stipulation of counsel amending paragraph 14 of affidavit of defense filed.
Oct. 18, 1933.	Argued sur rule for the production of books etc.
Oct. 19, 1933.	Appearance of Robert T. McCracken, Esq., for Merchants Warehouse Company filed.
Oct. 20, 1933.	Opinion, Dickinson, J, granting motion for production of writings (under 28 U. S. C. A. Sec. 636) filed.
Dec. 14, 1933.	Jury called—see minutes.
Mar. 19, 1934.	Jury called.
Mar. 20, 1934.	Trial resumed. Witnesses sworn.
Mar. 21, 1934.	Trial resumed. Witnesses sworn.
Mar. 22, 1934.	Trial resumed. Witnesses sworn.
Mar. 23, 1934.	Trial resumed. Witnesses sworn.

Mar. 26, 1934.	Trial resumed. Witnesses sworn.
Mar. 27, 1934.	Verdict for plaintiff. Damages assessed at $136,125.00.
Mar. 29, 1934.	Plaintiff's Bill of Costs filed.
Mar. 29, 1934.	Bill of Costs of Merchants Warehouse Company filed.
Mar. 29, 1934.	Order of Court extending time for filing motions for new trial by defendants filed.
Mar. 29, 1934.	Motion for judgment and to treble damages filed.
Apr. 3, 1934.	Defendants' Answer to plaintiff's motion for judgment and to treble damages filed.
Apr. 3, 1934.	Motion and reasons by defendant, Merchants Warehouse Company, for new trial filed.
Apr. 3. 1934.	Order of Court extending time for presenting and sealing Bill of Exceptions and extending term filed.
Apr. 4, 1934.	Bill of Costs of Pennsylvania Railroad Co. filed.
Apr. 6, 1934.	Supplemental Answer of Pennsylvania Railroad Company to plaintiff's motion for judgment and to treble damages filed.
Apr. 6, 1934.	Motion and reasons by defendant, The Pennsylvania Railroad Co., for new trial filed.
Apr. 21, 1934.	Petition for allowance of counsel fee filed.
May 3, 1934.	Defendants' Answer to petition for allowance of counsel fee filed.

May 4, 1934. Argued sur motion for new trial.

May 8, 1934. Opinion, Dickinson, J, directing that motion for new trial and in arrest of judgment be set down for re-argument filed.

May 28, 1934. Re-argument sur motion for new trial.

May 29, 1934. Exception by Pennsylvania Railroad Company to Order of Court overruling statutory demurrer and Order of Court granting exception nunc pro tunc filed.

May 29, 1934. Exception by Merchants Warehouse Company to Order of Court overruling statutory demurrer and Order of Court granting exception nunc pro tunc filed.

June 1, 1934. Opinion, Dickinson, J. discharging rule for new trial, denying motion in arrest of judgment and granting leave to plaintiff to move for judgment on the verdict in accordance with the Sherman Anti-Trust Act with costs and counsel fees filed.

June 6, 1934. Order of Court further extending term and time for presenting and sealing Bill of Exceptions filed.

June 12, 1934. Defendant, Pennsylvania Railroad Company's exception to refusal of Court to grant its motion for new trial and Order of Court granting exception filed.

June 12, 1934. Defendant, Merchants Warehouse Company's exception to refusal of

Court to grant its motion for new trial and Order of Court granting exception filed.

June 20, 1934. Argued sur motion for judgment and to treble damages and motion for counsel fee.

June 21, 1934. Defendants' Supplemental Answer to plaintiff's motion for judgment and to treble damages filed.

June 22, 1934. Opinion, Dickinson, J. making absolute rule for judgment for treble damages and for allowance of counsel fees and granting leave to enter judgment for plaintiff in $410,338.81 and fixing counsel fees at $27,000. to be taxed as part of the costs filed.

June 25, 1934. Præcipe to enter judgment filed.

June 25, 1934. Judgment in favor of plaintiff in $410,338.81 together with costs, including counsel fee of $27,000. filed.

July 2, 1934. Exception by Pennsylvania Railroad Company to Order for production of writings etc. and Order of Court granting exception filed.

July 2, 1934. Exception by Pennsylvania Railroad Company to Order trebling amount of verdict and allowing a counsel fee and Order of Court granting exception filed.

July 2, 1934. Exception by Merchants Warehouse Company to trebling of damages allowance of counsel fee and entry of judgment and Order of Court granting exception filed.

July 5, 1934. Supplemental Order of Court further extending time for presenting and sealing exceptions and further extending term filed.

July 26, 1934. Objections to Bill of Exceptions filed.

July 27, 1934. Defendants' Answer to plaintiff's objection to Bill of Exceptions filed.

Aug. 8, 1934. Bill of Exceptions and Order of Court sealing same filed.

Aug. 15, 1934. Defendants' Assignments of Error, filed.

Aug. 15, 1934. Petition for appeal filed.

Aug. 15, 1934. Order allowing appeal to act as supersedeas filed.

Aug. 15, 1934. Supersedeas Bond sur appeal in ($500,000.) with Fidelity & Deposit Company of Maryland as surety, approved and filed.

Aug. 15, 1934. Citation allowed and issued.

Aug. 15, 1934. Præcipe for record on appeal filed.

Aug. 15, 1934. Copy of notice of appeal filed.

Aug. 17, 1934. Citation returned: "Service accepted" and filed.

STATEMENT OF CLAIM.

(Filed March 12, 1932.)

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 16774. March Term, 1932.

TERMINAL WAREHOUSE COMPANY,
A CORPORATION,

v.

PENNSYLVANIA RAILROAD COMPANY,
A CORPORATION,

and

MERCHANTS WAREHOUSE COMPANY,
A CORPORATION.

The Terminal Warehouse Company, a corporation, plaintiff, claims of the Pennsylvania Railroad Company, a corporation, and the Merchants Warehouse Company, a corporation, defendants, the sum of four million five hundred thousand dollars ($4,500,000) (treble damages) upon a cause of action whereof the following is a statement. The ground upon which the jurisdiction of this Court depends is that this is a suit arising under the Acts of Congress of July 2, 1890, c. 647, sections 1 and 2, 26 Stat. 209, 15 U. S. C., sections 1 and 2, and of October 15, 1914, c. 323, section 4, 38 Stat. 731, 15 U. S. C., section 15.

1. The Terminal Warehouse Company, hereinafter referred to as "plaintiff," is a corporation duly incorporated under the laws of Pennsylvania.

2. The Pennsylvania Railroad Company, hereinafter referred to as "Railroad Company," is a corporation duly incorporated under the laws of Pennsylvania, and a common carrier for hire engaged in the transportation of freight and passengers to and from Philadelphia, Pennsylvania, from and to points within the Commonwealth of Pennsylvania and in other States.

3. The Merchants Warehouse Company, hereinafter referred to as "Merchants Company," is a corporation duly incorporated under the laws of Pennsylvania.

4. Plaintiff is, and during the past six years and much longer has constantly been engaged in carrying on a general warehousing business in the City of Philadelphia, Pennsylvania; in the course of which business it receives for storage, performance of other warehouse services, and/or distribution either within or outside of Pennsylvania, goods shipped over the lines of Railroad Company and other carriers, principally from points outside the State of Pennsylvania, and also receives from shippers and patrons in Philadelphia goods to be handled and forwarded and/or handled, stored and subsequently forwarded over the lines of Railroad Company and other carriers, principally to points outside the State of Pennsylvania.

5. Merchants Company is, and during the past six years and much longer has constantly been, engaged in carrying on a general warehousing business in the City of Philadelphia, Pennsylvania, similar to that described in paragraph four.

6. Plaintiff and Merchants Company have at all times during the past six years and much longer been actively competing with each other and with other warehouse companies for the warehousing business in the

City of Philadelphia, Pennsylvania, and each has actively solicited business, largely from customers outside the State of Pennsylvania.

7. Railroad Company is and during the past six years and much longer has been the owner of a considerable block of shares of Merchants Company and has received substantial dividends therefrom.

8. In violation of the Act of Congress of July 2, 1890, c. 647, sections 1 and 2, 26 Stat. 209, 15 U. S. C., sections 1 and 2, Railroad Company and Merchants Company have for the past six years and much longer combined and conspired to monopolize and restrain trade and commerce among the several States by combining and conspiring to render unprofitable and destroy the business of plaintiff and other competing warehouse companies in the City of Philadelphia, and to gain for Merchants Company a monopoly of the warehousing business in said city, and for Railroad Company a monopoly of the complementary transportation services and a further benefit in the increased dividends and value of the stock of Merchants Company; which combination and conspiracy has been carried out by means of the following acts among others:

9. By a series of written contracts extending over a period of thirty years or more, of which the more recent are dated July 1, 1916 (four contracts), January 25, 1917, July 3, 1918, April 10, 1922, March 4, 1925 and July 28, 1927, which contracts are in the possession of the defendants and will be produced at trial Railroad Company or one of its subsidiary companies agreed to make certain payments to Merchants Company for alleged services rendered by it in and about the receipt and delivery of freight both incoming and outgoing; and Merchants Company agreed to give preference in all its facilities to Railroad Company or one of its sub-

sidiary companies and to extend the use of said facilities to no other railroad without its consent, which contracts were in fact carried out by both parties thereto until the payments were declared illegal by the Supreme Court of the United States in May of 1931.

10. Since 1912 Railroad Company has in its published tariffs undertaken as a part of the transportation service covered by its tariffs to load and unload without charge package freight at warehouses of Merchants Company, which it in fact did until the practice was declared illegal by the Supreme Court of the United States in May of 1931; and the payments described in paragraph nine resulted in the transportation of the interstate traffic of Merchants Company at rates and charges lower than the rates and charges exacted by Railroad Company for similar transportation of plaintiff's interstate traffic performed contemporaneously.

11. The services rendered by Merchants Company, for which it was paid by Railroad Company as set forth in paragraphs nine and ten, were not transportation services nor a part of Railroad Company's duties, nor did they differ in substance from services which plaintiff and other warehouse companies competitive with Merchants Company performed at their own expense; therefore the payments for such services amounted to rebates which were unjustly discriminatory and illegal and were so declared by the Supreme Court of the United States in an opinion dated May 18, 1931.

12. By the agreement dated January 25, 1917, Railroad Company agreed not to make agreements with any other warehouse companies providing for payments similar to those described in paragraphs nine and ten; and it has not done so.

13. Merchants Company used the payments obtained from Railroad Company as set forth in paragraphs nine and ten, at least in part, to subsidize its warehousing business and to stimulate and promote its trade.

14. Railroad Company has during the past six years and much longer granted to Merchants Company unlimited storage on its tracks at Philadelphia of freight in cars, exempt from demurrage and other charges for detention made to plaintiff and other competing warehouses.

15. Railroad Company has constructed, paid for, owned and maintained at its expense sidetracks to the warehouses of Merchants Company without imposing any obligation whatever upon Merchants Company in return therefor, while plaintiff and other warehouse companies competitive with Merchants Company have had to acquire valuable lands and construct thereon, and to pay for a part of the sidetracks to their warehouses, and to construct, pay for and maintain other portions of said sidetracks, which sidetracks connect with the tracks of Railroad Company and are essential to plaintiff's business; and in obtaining such sidetracks the plaintiff and other warehouse companies competitive with Merchants Company have had to bear all costs of securing permission for the construction, maintenance and operation thereof from the necessary public authorities, and for the installation of crossing frogs to the Philadelphia Rapid Transit Company tracks, and for providing bonds to the public authorities as required by law; to pay all taxes, assessments and license fees in connection with the side tracks; to grant Railroad Company the free use of the side tracks when not otherwise in use; to indemnify Railroad Company for all claims arising from the use of the said sidetracks

because of loss by fire, regardless of Railroad Company's negligence, for loss because of any act or omission on the part of plaintiff or its employees, or because of inadequacy of clearance; to assume any cost of readjustment to the sidetracks necessitated by change in the grade or location of the tracks of Railroad Company; to grant Railroad Company the right to make any necessary repairs to that portion of the sidetracks to be maintained by warehouse company on its failure to do so, and to reimburse Railroad Company for all costs and to hold it free from liability for any claims or injury arising from such repairs; and further to grant Railroad Company the right under certain circumstances to remove the portion of trackage owned by it without liability to warehouse company; all of which has been a great cost and burden to plaintiff and other warehouse companies competitive with Merchants Company.

16. By the four agreements dated July 1, 1916, Merchants Company promised to use its best efforts to secure to the lines of Railroad Company all the traffic controlled by it; and it has in fact routed substantially all such traffic over the lines of Railroad Company.

17. Railroad Company has during the past six years and much longer printed statements in its filed and published tariffs to the effect that the warehouses of Merchants Company were public freight stations of Railroad Company, with purpose unduly to influence shippers and patrons to route the warehouse freight traffic through Merchants Company; and it has held Merchants Company forth as its agent and allowed Merchants Company to assert that it was Railroad Company's agent to the same end and purpose; and by other published and circulated pamphlets, letters and other writings, and by personal solicitation through

its officers and agents, it has sought to influence users of warehouse services in Philadelphia to use the warehouses of Merchants Company.

18. Because of the free storage, the free sidetracks, the unduly preferential diversion of warehouse traffic by Railroad Company through warehouses operated by Merchants Company, and the system of illegal rebates set forth in paragraphs nine, ten, eleven, fourteen, fifteen and seventeen, Merchants Company was enabled to and did charge less than the fair, just and normal value for its services to shippers, and loaded and unloaded package freight without charge and allowed shippers forty-eight hours' free storage in its warehouses, which charges, free handling and free storage both it and the Railroad Company widely advertised in the State of Pennsylvania and other States and specifically called to the attention of many of plaintiff's customers, largely outside of the State of Pennsylvania, by which practices defendants did in fact secure for themselves more than their just, fair and normal portion of all of the warehousing and complementary transportation business in Philadelphia, Pennsylvania, and such a large percentage of said business in many of the heavier commodities, among them flour, newsprint paper, canned goods and sugar, as to constitute a monopoly or a tendency to monopoly of said part of the warehousing and complementary transportation business in violation of the Act of Congress of July 2, 1890, c. 647, section 2, 26 Stat. 209, 15 U. S. C., section 2.

19. Plaintiff has during the past six years and much longer operated a system of nine warehouses at various locations within the City of Philadelphia, known as the "Fairmount," "Spring Garden Street," "Brown Street," "Twelfth Street," and "Twenty-fifth Street" stores, "Terminal Sales Building" and Piers "31 North," "35½ North" and "36 North" which

warehouses are at least as well located, managed and equipped in every respect as those of Merchants Company and other competing warehouse companies, and it has at all times been able and willing to handle and has made every reasonable effort to gain and retain its fair, just and normal share of the warehousing business in the City of Philadelphia; but due to the combination and conspiracy complained of and the low prices and free storage and the free handling in many cases which Merchants Company was thus enabled to and did offer and the practices thereunder as set forth in paragraphs 17 and 18, plaintiff was prevented from obtaining its fair, just and normal share of the warehousing business in Philadelphia and many of its customers were enticed away from it so that plaintiff's business has been curtailed much below its fair, just and normal volume and it has lost the profits it would have made therefrom; and plaintiff has in that business which it has succeeded in obtaining and retaining been forced to reduce its charges far below their fair, just and normal amount, thus reducing its profits, all to its great loss, to wit: one million five hundred thousand dollars ($1,500,000).

20. The Terminal Warehouse Company, a corporation, plaintiff, therefore claims of Pennsylvania Railroad Company, a corporation, and Merchants Warehouse Company, a corporation, defendants, the sum of four million five hundred thousand dollars ($4,500,000) which is treble the amount of damages by it sustained, and costs including a reasonable attorney's fee, in accordance with the Act of Congress of October 15, 1914, c. 323, section 4, 38 Stat. 731, 15 U. S. C., section 15.

JOHN J. HICKEY,
WHITE, SCHNADER, MARIS & CLAPP,
Attorneys for Plaintiff

COMMONWEALTH OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } *ss.:*

ERNEST V. D. SULLIVAN, being duly sworn according to law, deposes and says that he is president of the Terminal Warehouse Company, the plaintiff above named, and an officer of that corporation duly authorized to make this proof on its behalf; that he has read the foregoing statement of claim and the facts therein set forth that are within his own knowledge are true, and those averred upon information derived from others he heartily believes to be true and expects the plaintiff to be able to prove upon the trial of this cause.

(Sgd.) ERNEST V. D. SULLIVAN.

Sworn to and subscribed before me this seventh day of March, 1932.

FLORENCE M. RUFF,
(Seal) *Notary Public.*
My commission expires February 21, 1935.

STIPULATION OF COUNSEL FOR FILING OF EXHIBITS.

(Filed April 27, 1932.)

AND Now, April 25, 1932, it is stipulated and agreed between counsel in the above-entitled case, that the copies of the agreements between the Pennsylvania Railroad Company or one of its subsidiaries and the Merchants Warehouse Company, dated July 1, 1916 (four contracts), January 25, 1917, July 31, 1918, April 10, 1922, March 4, 1925, and July 28, 1927 and referred to in paragraph 9 of plaintiff's statement of claim, attached herto, be filed as exhibits in the above-entitled case with the same force and effect as if they had originally been attached to plaintiff's statement of claim.

WHITE, SCHNADER, MARIS & CLAPP,
T. R. WHITE,
Counsel for Terminal Warehouse Company.
BARNES, BIDDLE & MYERS,
By: OWEN J. WISTER,
Counsel for Pennsylvania Railroad Company.
M. HAMPTON TODD,
Counsel for Merchants Warehouse Company.

AGREEMENT.

Pennsylvania Railroad Company and Merchants Warehouse Company.

THIS AGREEMENT, Made this first day of July nineteen hundred and sixteen (1916) between The Pennsylvania Railroad Company, hereinafter called the "Railroad Company," of the one part, and the Merchants Warehouse Company, a Corporation of the State of Pennsylvania, hereinafter called the "Warehouse Company," of the other part,

Witnesseth, That the Railroad Company for and in consideration of the rents and covenants and agreements hereinafter mentioned, which on the part of the Warehouse Company are to be paid, kept and performed, hath demised and let and by these presents doth demise and let unto the Warehouse Company, all that certain lot or piece of land situate in the Eighteenth Ward of the City of Philadelphia, Pennsylvania, bounded and described as follows: Beginning at an angle in the southeast line of Beach Street distant about one hundred and forty-seven feet northeast of the northeast line of Laurel Street, and extending thence northeastward along the said southeasterly line of Beach Street two hundred and seventy-five feet to a point; thence southeastward at right angles to said line of Beach Street fifty-five feet to a point; thence southwestward parallel with said line of Beach Street one hundred feet to a point, thence northwestward at right angles to last mentioned course five feet; thence southwestward parallel with said line of Beach Street one hundred and seventy-five feet to a point; and thence northwestward at right angles to last mentioned course, fifty feet to the place of beginning.

Together with the privilege of maintaining at the sole cost and expense of the Warehouse Company the warehouse building, owned by it, as now erected on the above demised land.

To hold the said premises for and during the term of ten (10) years from the first day of July nineteen hundred and sixteen (1916), at and for the rent or sum of two thousand, two hundred and fifty dollars ($2,250.00) per year, to be paid in equal quarterly payments, in advance, on the first day of the month of July, October, January and April, in each year during the said term;

Together with a further rental which shall be equal to the amount of all taxes, water rents and other assessments levied upon the said land and improvements during the continuance of this lease, to be paid to the Railroad Company when demanded.

The Railroad Company hereby covenants and agrees to and with the Warehouse Company, as follows:

A. To maintain railroad tracks adjacent to said warehouse, and to do the necessary shifting to enable its cars to reach the warehouse aforesaid for the purpose of taking from and delivering to the same all freight to be shipped therefrom or destined thereto, and shall and will take and deliver the same over its lines at the same rates (except in case of traffic hauled short distances, upon which it is customary for the Railroad Company to apply rates varying with respect to different station deliveries in the City of Philadelphia) and in the same manner and with the same promptness that it delivers and receives like traffic at any other terminal point controlled by it in the City of Philadelphia.

B. To pay to the Warehouse Company for all services rendered by it in and about the receipt and delivery

of freight, both incoming and outgoing, thirty-five cents (35¢) per ton (of two thousand—2,000—pounds) for each ton of merchandise, except that no payment shall be made upon bulk freight, nor upon freight the movement of which by the Railroad Company has been performed at a switching rate, nor material and supplies belonging to the Railroad Company.

The Warehouse Company hereby covenants and agrees to and with the Railroad Company, as follows:

I. To pay to the Railroad Company the rent hereby reserved on the days and times hereinbefore mentioned for the payment thereof, together with said further rental equal to the amount of all taxes, water rents and other assessments levied or charged upon the said premises; to keep the said warehouse fully insured during the continuance of this agreement and not to commit or suffer to be committed any act or thing whereby or in consequence whereof the conditions or stipulations of the policy or policies of insurance on the said premises shall become avoided or suspended; to keep the said warehouse in good order and repair, at its own cost and expense, during the continuance of this lease and at the end of said term or sooner determination of said lease peaceably deliver up possession of said premises in good order and condition; not to occupy or permit to be occupied the said premises otherwise than for the maintenance of a warehouse for the storage of flour, grain and other merchandise.

Provided, that in the event of the destruction of the said warehouse by fire, this agreement shall cease and terminate and the rent shall be apportioned to the time of such injury, unless the Warehouse Company shall within sixty days declare its intention in writing to the Railroad Company and proceed forthwith to rebuild the said warehouse; in such event the said rent shall cease from the time of such destruction until the warehouse is again in condition for use.

II. a. To use all reasonable efforts to secure to the lines of The Pennsylvania Railroad Company's system, of which the railroads of Railroad Company form part, all traffic controlled by it or destined to or from the warehouse aforesaid, and to accord to traffic passing over said lines, at all times, preference in the facilities furnished by the Warehouse Company over traffic passing over other lines, it being further understood that without the consent of the Railroad Company the said facilities shall not be extended to traffic passing over other lines.

b. To promptly load and unload and handle all freight received by it to be shipped over the lines of Railroad Company or received by it for delivery to consignee and in the case of incoming freight to promptly notify consignee of the arrival thereof.

c. To be responsible to Railroad Company for the prompt collection of all freight and other charges upon inbound freight, payment to be made by Warehouse Company to Railroad Company on the fifth day of each month of freight and other charges due on account of all freight delivered to it during the preceding month, excepting, however, any such charges which the Railroad Company may, from time to time, elect to collect direct from any consignee; and in order to secure Railroad Company, Warehouse Company shall furnish to it a bond with such good and sufficient sureties, and in such amount as shall be approved by Railroad Company, conditioned for the prompt payment of the said freight and other charges and for the performance by Warehouse Company of all its other covenants hereunder.

d. To indemnify and hold harmless Railroad Company for all damage to, or loss of, freights in its cus-

tody or control, and all liability by reason thereof, and to keep an adequate and sufficient line of fire insurance on all such freight.

e. To promptly notify Railroad Company in writing of the failure of any consignee to remove freight and to observe and comply with all directions with respect to such freight which may be received by it from Railroad Company.

f. To protect and indemnify Railroad Company from and against all manner or liability on account of any acts of omission or commission on the part of it, the said Warehouse Company, in respect to merchandise received by it at said warehouse to be forwarded over the Railroad Company's lines or to be delivered to consignees and also from and against all manner of liability on account of receipts for merchandise issued by it.

It is hereby mutually understood and agreed:

1. That at the expiration of the period during which the Railroad Company shall currently allow freight to remain at its warehouses before delivery without charge to the consignees, freight delivered by the Railroad Company to the Warehouse Company which has not been delivered to the consignees, or party entitled to receive the same, or which shall not by direction of said Railroad Company have been returned to the shipper thereof, or otherwise disposed of, shall be regarded and treated as stored with Warehouse Company by Railroad Company for account of the owners thereof, and thereupon the Warehouse Company shall be entitled to deal with the property and to make such charges for its custody as it may lawfully and properly do, and shall be further entitled to dispose of the same in such manner, and at such times as

it may lawfully and properly do, for the purpose of realizing its charges thereon.

2. The Warehouse Company shall have the right to renew this agreement for a further period of ten (10) years from the first day of July, nineteen hundred and twenty-six (1926), under all the terms, covenants, conditions and provisions herein contained, upon giving to the Railroad Company six months notice prior to the expiration of the term hereby created, but such renewal thereof shall not contain a provision for a renewal for a further period of ten years; Provided, however, that should the Railroad Company require the above demised premises or any part thereof for its corporate purposes it shall have the right upon giving six months notice to the Warehouse Company to terminate this agreement at any time during the term hereby created or any renewal thereof and upon the expiration of the time mentioned in such notice this agreement and any renewal thereof shall absolutely determine and the Warehouse Company shall quit and deliver up possession of the said premises to the Railroad Company; in case of such determination by the Railroad Company and other warehouse facilities are provided by either the Railroad Company or the Warehouse Company to take the place of the above demised premises, and if the Warehouse Company shall occupy such new facilities, then the same terms, conditions, covenants and provisions pertaining to traffic and the handling of freight to and from the warehouse and the compensation therefor, as are contained in this agreement shall govern and control the traffic conditions and the handling of freight to and from the new warehouse facilities and the compensation therefor.

3. If, even without any previous demand, the Warehouse Company shall fail or omit to pay the rents

or sums hereby reserved when the same are made payable or shall in any other respect violate or fail to comply with any of the conditions and covenants herein contained, then this lease and the tenancy thereunder shall, at the option of the Railroad Company, to be signified by a written notice of its intention so to determine this lease, on a day therein fixed, delivered to it, or left on the premises, at least thirty days previous to the day so fixed, determine and become absolutely void, without any right on its part, after the day so fixed, to save the forfeiture by payment of rent due, or by other performance of the condition or conditions thus violated, That when the lease shall be so determined by condition broken and notice as aforesaid, it shall be lawful for any attorney, as attorney for the Warehouse Company, to sign an agreement for entering in any competent Court an amicable action and judgment in ejectment (without any stay of execution) against the Warehouse Company and all persons claiming under it for the recovery by the Railroad Company of the possession of the hereby demised premises, for which this shall be a sufficient warrant, whereupon, if the Railroad Company so desires, a writ of habere facias possessionem may issue forthwith, without any prior writ or proceedings whatsoever, the Warehouse Company hereby releasing and agreeing to release the Railroad Company from all errors and defects whatsoever in entering such action or judgment or causing such possessory writ to be issued, or in any proceedings thereon, or concerning the same, and hereby agreeing that no writ of error or objection or exception shall be made or taken thereto; Provided, that the Railroad Company shall first cause to be filed in such action an affidavit made by some one on its behalf, setting forth the facts necessary to authorize the entry of such judgment according to the terms of this lease, and if a true copy of this lease shall be annexed to such affidavit, it

shall not be necessary to file the original as a warrant of attorney, any rule of court to the contrary notwithstanding. No such determination of this lease, nor taking or recovering possession of the premises shall deprive the Railroad Company of any remedy or action against the Warehouse Company for rent or for damages for the breach of any covenant herein contained, nor shall the bringing of any such action for rent or for breach of covenant, nor the resort to any other remedy herein provided for the recovery of rent or damages for such breach be construed as a waiver of its right to insist upon the forfeiture and obtain possession in the manner hereinabove provided.

4. That at the end of the term hereby created, or any renewal thereof, or upon the sooner determination of the agreement as hereinbefore provided, the Warehouse Company will sell and convey the said warehouse to the Railroad Company at its then value, and if the parties hereto cannot agree upon the same, then the value thereof shall be fixed by arbitrators as follows, but not exceeding the original cost of the building:

The party demanding the reference shall serve upon the other party a notice of such demand and the name of one referee by it chosen. The party so notified shall, within ten days after receiving such notice, select a second referee and notify the other party thereof in writing, or if it shall fail to select a referee, the referee selected by the party demanding the reference shall select the second referee. The referees so selected shall within a reasonable time meet and select a third referee and fix a time and place for hearing the parties of which they shall be notified in writing. If any referee shall refuse to act, the party by whom he was chosen shall select another to act in his place. The award of any two of said referees, made after hearing the party or parties who have attended in compliance with the

notice required to be given, as above stated, shall be final and binding upon the parties, and they severally hereby expressly agree to be bound thereby.

5. That if the terms and conditions of this agreement shall be found to work onerously to the interests of either party hereto, the said terms and conditions shall, at the written request of either party be subject to revision at the end of any period of two years; and if the parties hereto cannot agree upon such revision, or any question shall arise as to the proper construction of any of the provisions herein contained, or differences as to any act or duty claimed to be involved in the performance hereof, if the same cannot be amicably adjusted then the same shall be settled by arbitration as hereinbefore provided.

That all the rights and liabilities herein given to or imposed upon either of the parties hereto shall extend to the successors and assigns of such party as though they were in each case named, unless where the assigns are expressly excluded from certain rights.

The said The Pennsylvania Railroad Company, doth hereby constitute and appoint W. H. Myers to be its Attorney, for it and in its name, and as and for its corporate act and deed to acknowledge this Agreement before any person having authority by the laws of the Commonwealth of Pennsylvania to take such acknowledgment to the intent that the same may be duly recorded.

The said Merchants Warehouse Company, doth hereby constitute and appoint Harvey C. Miller to be its Attorney, for it and in its name, and as and for its corporate act and deed to acknowledge this Agreement before any person having authority by the laws of the Commonwealth of Pennsylvania to take such acknowledgment to the intent that the same may be duly recorded.

In witness whereof, the parties hereto have hereunto fixed their respective corporate seals, duly attested, the day and year first above written.

The Pennsylvania Railroad Company, by W. H. Myers, Vice-President. Attest: Lewis Neilson, Secretary. (Seal) Merchants Warehouse Company, by Harvey C. Miller, President. Attest: Charles Hay, Secretary. (Seal)

(Cancelled 50-cent internal-revenue stamp.)

STATE OF PENNSYLVANIA,
County of Philadelphia, ss.

I hereby certify that on this 18th day of July in the year of our Lord one thousand nine hundred and sixteen (1916) before me, the subscriber, a Notary Public in and for the County and State aforesaid personally appeared W. H. Myers the Attorney named in the aforegoing Agreement, and by virtue and in pursuance of the authority therein conferred upon him, acknowledged the said Agreement to be the act of the said The Pennsylvania Railroad Company.

Witness my hand and notarial seal, the day and year aforesaid.

Ernest H. Brown, Notary Public.
Commission expires 21 February, 1919. (SEAL)

STATE OF PENNSYLVANIA,
County of Philadelphia, ss.

I hereby certify that on this 18th day of July in the year of our Lord one thousand nine hundred and sixteen (1916) before me, the subscriber, a Notary Public in and for the State and County aforesaid personally appeared Harvey C. Miller the Attorney named in the aforegoing Agreement, and by virtue and in pursuance of the authority therein conferred upon him, acknowledged the said Agreement to be the act of the said Merchants Warehouse Company.

Witness my hand and notarial seal, the day and year aforesaid.

James Hay Simms, Notary Public.
Com. expires Feb. 11, 1917.

I am not an officer, director or stockholder of the Merchants Warehouse Company.

AGREEMENT.

Pennsylvania Railroad Company and Merchants Warehouse Company.

THIS AGREEMENT, made this 1st day of July, Nineteen hundred and sixteen (1916) between The Pennsylvania Railroad Company, Lessee of the works and property of the Philadelphia and Trenton Railroad Company, hereinafter called "Railroad Company", of the one part, and the Merchants Warehouse Company, a Corporation of the State of Pennsylvania, hereinafter called the "Warehouse Company", of the other part:

Witnesseth, that the Railroad Company for and in consideration of the rents and covenants and agreements hereinafter mentioned, which on the part of the Warehouse Company are to be paid, kept and performed, hath demised and let and by these presents doth demise and let unto the Warehouse Company, all that certain lot or piece of land with the one story corrugated iron warehouse thereon erected, situate in the Nineteenth Ward of the City of Philadelphia, Pennsylvania, Beginning at a point fourteen feet east of the easterly line of Front Street and in the southerly line of Berks Street, if extended eastwardly, and extending thence along the said southerly line of Berks Street, if extended eastwardly, the distance of fifty feet to a point thence southwardly along a line parallel with and sixty-four feet east of the easterly line of Front Street, the distance of two hundred and eighty-eight feet eight inches to a point; thence westwardly at right angles to the last mentioned course, fifty feet to a point; and thence northwardly along a line parallel with and fourteen feet eastwardly from the said

easterly line of Front Street, the distance of two hundred and eighty-eight feet eight inches to the place of beginning. Containing fourteen thousand, four hundred and thirty-three (14,433) square feet, more or less.

To hold the said premises for and during the term of ten (10) years, from the first day of July, Nineteen hundred and sixteen (1916), at and for the rent or sum of One thousand six hundred and fifty dollars ($1,650.00) per year, to be paid in equal quarterly payments, in advance, on the First day of the months of July, October, January and April, during said term; Together with a further rental which shall be equal to the amount of all taxes and water rents and other assessments levied or charged upon the above demised premises during the continuance of this lease; and together with a further sum which shall be equal to the cost of maintaining fire insurance of Fourteen thousand, four hundred and fifty dollars ($14,450.00) to be placed by the Railroad Company upon the buildings, machinery, fixtures and appliances now erected upon and placed in the hereby demised premises, whether such insurance shall be wholly secured from Insurance Companies or partly provided for by the insurance fund set apart by the Railroad Company.

The Railroad Company hereby covenants and agrees to and with the Warehouse Company, as follows:

A. To maintain railroad tracks adjacent to said warehouse and to do the necessary shifting to enable its cars to reach the warehouse aforesaid for the purpose of taking from and delivering to the same all freight to be shipped therefrom or destined thereto and shall and will take and deliver the same over its lines at the same rates (except in case of traffic hauled short distances, upon which it is customary for the

Railroad Company to apply rates varying with respect to different station deliveries in the City of Philadelphia) and in the same manner and with the same promptness that it delivers and receives like traffic at any other terminal point controlled by it in the City of Philadelphia.

B. To pay to the Warehouse Company for all services rendered by it in and about the receipt and delivery of freight, both incoming and outgoing, thirty-five cents (35¢) per ton (of two thousand pounds) for each ton of merchandise, except that no payment shall be made upon bulk freight, nor upon freight the movement of which by the Railroad Company has been performed at a switching rate, nor material and supplies belonging to the Railroad Company.

The Warehouse Company hereby covenants and agrees to and with the Railroad Company, as follows:

I. To pay to the Railroad Company the rent hereby reserved on the days and times hereinbefore mentioned for the payment thereof, together with said further rental equal to the amount of all taxes, water rents and other assessments levied or charged upon the said premises and together with the said further sum which shall be equal to the cost of maintaining fire insurance on the said premises, and to keep the said demised premises in good order and repair during the continuance of this lease and at the end of the said term or sooner determination of said lease will peaceably deliver up possession of the said premises in the like good order and condition, ordinary wear and tear and casualties by fire and unavoidable accidents only excepted; and will not under penalty of forfeiture of this lease commit or suffer to be committed any act or thing whereby or in consequence whereof the conditions or stipulations of the policy or policies of insur-

ance on the said premises shall become avoided or suspended; or occupy or permit to be occupied the said premises otherwise than as a warehouse for the storage of hay, straw and merchandise; that it will not assign this lease, or the term hereby created, or underlet the said premises or any part thereof, without the written consent of the Railroad Company endorsed hereon, an assignment within the meaning of this lease being understood and intended to comprehend not only the voluntary action of the Warehouse Company but also every levy or sale on execution or other legal process and every assignment or sale in bankruptcy or insolvency or under any other compulsory procedure or order of court; and that upon the happening of any legal proceedings, the effect of which shall be to divest the title or possession of the Warehouse Company, this agreement shall at the option of the Railroad Company cease and determine.

II. a. To use all reasonable efforts to secure to the lines of The Pennslyvania Railroad Company's system, of which the railroads of Railroad Company form part, all traffic controlled by it or destined to or from the warehouse aforesaid, and to accord to traffic passing over said lines, at all times, preference in the facilities furnished by the Warehouse Company over traffic passing over other lines; it being further understood that without the consent of the Railroad Company the said facilities shall not be extended to traffic passing over other lines.

b. To promptly load and unload and handle all freight received by it to be shipped over the lines of Railroad Company, or received by it for delivery to consignees, and in the case of incoming freight to promptly notify consignees of the arrival thereof.

c. To be responsible to the Railroad Company for the prompt collection of all freight and other charges upon inbound freight, payment to be made by Warehouse Company to Railroad Company on the fifth day of each month of freight and other charges due on account of all freight delivered to it during the preceding month, excepting, however, any such charges which the Railroad Company may, from time to time, elect to collect direct from any consignee; and in order to secure Railroad Company, Warehouse Company shall furnish to it a bond with such good and sufficient sureties, and in such amount as shall be approved by Railroad Company, conditioned for the prompt payment of the said freight and other charges and for the performance by Warehouse Company of all its other covenants hereunder.

d. To indemnify and hold harmless Railroad Company for all damage to, or loss of, freights in its custody or control, and all liability by reason thereof, and to keep an adequate and sufficient line of fire insurance on all such freight.

e. To promptly notify Railroad Company in writing of the failure of any consignee to remove freight, and to observe and comply with all directions with respect to such freight which may be received by it from Railroad Company.

f. To protect and indemnify the Railroad Company from and against all manner of liability on account of any acts of omission or commission on the part of it, the said Warehouse Company, in respect to merchandise received by it at said warehouse to be forwarded over the Railroad Company's lines or to be delivered to consignees, and also from and against all manner of liability on account of receipts for merchandise issued by it.

It is hereby mutually understood and agreed:

1. That at the expiration of the period during which the Railroad Company shall currently allow freight to remain at its warehouses before delivery without charge to the consignees, freight delivered by the Railroad Company to the Warehouse Company which has not been delivered to the consignee, or party entitled to receive the same, or which shall not by direction of said Railroad Company have been returned to the shipper thereof, or otherwise disposed of, shall be regarded and treated as stored with Warehouse Company by Railroad Company for account of the owners thereof, and thereupon the Warehouse Company shall be entitled to deal with the property and to make such charges for its custody as it may lawfully and properly do, and shall be further entitled to dispose of the same in such manner, and at such times, as it may lawfully and properly do, for the purpose of realizing its charges thereon.

2. If, during the term of this lease, the warehouse is so injured by fire or other casualty not occurring through the Warehouse Company's negligence that it is rendered wholly unfit for occupancy and cannot be repaired within sixty days from the happening of such injury, then this lease shall cease and determine from the date of such injury. In such case the Warehouse Company shall pay the rent apportioned to the time of injury, and shall immediately surrender the whole of the leased premises to the Railroad Company who may re-enter upon and repossess the same. If such injury can be repaired within sixty days thereafter the Railroad Company may enter and repair, and this lease shall not be effected, except that the rent shall be apportioned and suspended while such repairs are being made; but if said warehouse shall be so slightly

injured by fire or other casualty as not to be rendered wholly unfit for occupancy, then the Railroad Company agrees that the same shall be repaired with reasonable promptitude and in that case the rent accrued or accruing shall not cease or determine.

3. The Warehouse Company shall have the right to renew this agreement for a further period of ten (10) years from the first day of July nineteen hundred and twenty-six (1926) under all the terms, covenants, conditions and provisions herein contained, upon giving to the Railroad Company six (6) months notice prior to the expiration of the term hereby created, but such renewal thereof shall not contain a provision for a renewal for a further period of ten years; Provided, however, that should the Railroad Company require the above demised premises or any part thereof for its corporate purposes it shall have the right upon giving ninety (90) days notice to the Warehouse Company to terminate this agreement at any time during the term hereby created or any renewal thereof and upon the expiration of the time mentioned in such notice, this agreement and any renewal thereof shall absolutely determine and the Warehouse Company shall quit and deliver up possession of the said premises to the Railroad Company; in case of such determination by the Railroad Company and other warehouse facilities are provided by either the Railroad Company or the Warehouse Company to take the place of the above demised premises, and if the Warehouse Company shall occupy such new facilities, then the same terms, conditions, covenants and provisions pertaining to traffic and the handling of freight to and from the warehouse and the compensation therefor, as are contained in this agreement shall govern and control the traffic conditions and the handling of freight to and from the new warehouse facilities and the compensation therefor.

4. If, even without any previous demand, the Warehouse Company shall fail or omit to pay the rents or sums hereby reserved when the same are made payable or shall in any other respect violate or fail to comply with any of the conditions and covenants herein contained, then this lease and the tenancy thereunder shall, at the option of the Railroad Company, to be signified by a written notice of its intention so to determine this lease, on a day therein fixed, delivered to it, or left on the premises, at least thirty days previous to the day so fixed, determine and become absolutely void, without any right on its part, after the day so fixed, to save the forfeiture by payment of rent due, or by other performance of the condition or conditions thus violated. That when the lease shall be so determined by condition broken and notice aforesaid, it shall be lawful for any attorney as attorney for the Warehouse Company, to sign an agreement for entering in any competent court an amicable action and judgment in ejectment (without any stay of execution) against the Warehouse Company and all persons claiming under it for the recovery by the Railroad Company of the possession of the hereby demised premises, for which this shall be a sufficient warrant, whereupon, if the Railroad Company so desires, a writ of habere facias possessionem may issue forthwith, without any prior writ or proceedings whatsoever, the Warehouse Company hereby releasing and agreeing to release the Railroad Company from all errors and defects whatsoever in entering such action or judgment or causing such possessory writ to be issued, or in any proceedings thereon, or concerning the same, and hereby agreeing that no writ of error or objection or exception shall be made or taken thereto; Provided, that the Railroad Company shall first cause to be filed in such action an affidavit made by some one on its behalf, setting forth the facts necessary to authorize the entry of such judgment ac-

cording to the terms of this lease, and if a true copy of this lease shall be annexed to such affidavit, it shall not be necessary to file the original as a warrant of attorney, any rule of court to the contrary notwithstanding. No such determination of this lease, nor taking or recovering possession of the premises shall deprive the Railroad Company of any remedy or action against the Warehouse Company for rent or for damages, for the breach of any covenant herein contained, nor shall the bringing of any such action for rent or for breach of covenant, nor the resort to any other remedy herein provided for the recovery of rent or damages for such breach be construed as a waiver of its right to insist upon the forfeiture and obtain possession in the manner hereinabove provided.

5. That if the terms and conditions of this agreement shall be found to work onerously to the interests of either party hereto, the said terms and conditions shall, at the written request of either party be subject to revision at the end of any period of two (2) years; and if the parties hereto cannot agree upon such revision, or any question shall arise as to the proper construction of any of the provisions herein contained, or differences as to any act or duty claimed to be involved in the performance hereof, if the same cannot be amicably adjusted then the same shall be settled by arbitration as follows:

The party demanding the reference shall serve the other party a notice of such demand, stating the question upon which it demands the judgment of the referees and the name of one referee by it chosen. The party so notified shall, within ten days after receiving such notice, select a second referee and notify the other party thereof in writing, or if it shall fail to select a referee, the referee selected by the party demanding the reference shall select the second referee. The ref-

erees so selected shall within a reasonable time meet and select a third referee and fix a time and place for hearing the parties, of which they shall be notified in writing. If any referee shall refuse to act, the party by whom he was chosen shall select another to act in his place. The award of any two of said referees made after hearing the party or parties who have attended in compliance with the notice required to be given, as above stated, shall be final and binding on the parties, and they severally hereby expressly agree to be bound thereby.

That all the rights and liabilities herein given to or imposed upon either of the parties hereto shall extend to the successors and assigns of such party as though they were in each case named, unless where the assigns are expressly excluded from certain rights.

In witness whereof the parties hereto have hereunto affixed their respective corporate seals, duly attested, the day and year above written.

The Pennsylvania Railroad Company, Lessee, by W. H. Myers, Vice-President. Attest: Leon Wilson, Secretary. (Seal) Merchants Warehouse Company, by Harvey C. Miller, President. Attest: Charles Hay, Secretary. (Seal)

(Cancelled 50-cent internal revenue stamp.)

INDENTURE.

Philadelphia, Baltimore and Washington Railroad Company and Merchants Warehouse Company.

THIS INDENTURE made this 1st day of July, nineteen hundred and sixteen (1916) between the Philadelphia, Baltimore and Washington Railroad Company, hereinafter called the "Railroad Company", of the one part, and the Merchants Warehouse Company, hereinafter called the "Warehouse Company", of the other part,

Witnesseth, That the Railroad Company for and in consideration of the rents and covenants and agreements hereinafter mentioned, which on the part of the Warehouse Company are to be paid, kept and performed, hath demised and let and by these presents doth demise and let unto the Warehouse Company,

All that certain lot or piece of land with the three story brick warehouse thereon erected, situate in the Thirtieth Ward of the City of Philadelphia, Pennsylvania, bounded and described as follows: Beginning at a point at the intersection of the westerly side of Fifteenth Street with the southerly side of Carpenter Street and extending thence westwardly along said southerly side of Carpenter Street three hundred and ninety-five feet to a point at the intersection of the southerly side of Carpenter Street with the easterly side of Sixteenth Street; thence southwardly along said easterly side of Sixteenth Street fifty-four feet to a point; thence eastwardly at right angles to Sixteenth Street and parallel with said Carpenter Street three hundred and ninety-five feet to a point in said westerly side of Fifteenth Street; and thence northwardly along said side of Fifteenth Street fifty-four feet to the place

of beginning. Containing twenty-one thousand, three hundred and thirty (21,330) square feet, more or less.

To hold the said premises for and during the term of ten (10) years, commencing the first day of July, nineteen hundred and sixteen (1916), at and for the rent or sum of ten thousand, three hundred and seventy dollars (10,370.00) per year, to be paid in equal quarterly payments, not in advance, on the first day of the months of October, January, April and July of each year during said term;

Together with a further rental, payable when demanded, which shall be equal to the amount of all taxes, water rent and other assessments which may be charged, levied, assessed and payable against the hereby demised premises during the continuance of this lease; and together with such further sum as shall be equal to the cost of maintaining fire insurance to be placed by the Railroad Company on the buildings, structures, machinery, fixtures and appurtenances now or hereafter erected upon the demised premises, in such amount as in the judgment of the Railroad Company shall be adequate, said sum to be paid when demanded.

The Railroad Company hereby covenants and agrees to and with the Warehouse Company, as follows:

A. To maintain railroad tracks adjacent to said warehouse and to do the necessary shifting to enable its cars to reach the warehouse aforesaid for the purpose of taking from and delivering to the same all freight to be shipped therefrom or destined thereto, and shall and will take and deliver the same over its lines at the same rates (except in case of traffic hauled short distances upon which it is customary for the Railroad Company to apply rates varying with respect to different station deliveries in the City of Philadel-

phia) and in the same manner and with the same promptness that it delivers and receives like traffic at any other terminal point controlled by it in the City of Philadelphia.

B. To pay to the said Warehouse Company for all services rendered by it in and about the receipt and delivery of freight, both incoming and outgoing, the amounts following:—Three and one-half (3½) cents per barrel for each barrel of flour up to fifty thousand (50,000) barrels per month; two and one-half (2½) cents per barrel for each barrel over the said fifty thousand (50,000) barrels per month and thirty-five (35) cents per ton (of two thousand pounds) for each ton of merchandise, except that no payment shall be made upon bulk freight, nor upon freight the movement of which by the Railroad Company has been performed at a switching rate, nor material and supplies belonging to the Railroad Company.

The Warehouse Company hereby covenants and agrees to and with the Railroad Company, as follows:

I. To pay to the Railroad Company the rent hereby reserved on the days and times hereinbefore mentioned for the payment thereof, together with said further rental equal to the amount of all taxes, water rent and other assessments payable against said premises, to be paid when demanded and the cost of maintaining said amount of fire insurance; and during the continuance of this lease to keep said premises in good order and repair at its own cost and expense and at the end of said term or other sooner determination of this lease to peaceably deliver up possession of said premises in the like good order and condition, ordinary wear and tear and damage by fire and unavoidable accidents only excepted, and will not under penalty of forfeiture of this lease commit or suffer to be committed any act

or thing whereby or in consequence whereof the conditions or stipulations of the policy or policies of insurance on the said premises shall become avoided or suspended, or occupy or permit to be occupied the said premises otherwise than as a warehouse for the storage of general merchandise, that it will not assign this lease, or the term hereby created, or underlet the said premises, or any part thereof, without the written consent of the Railroad Company endorsed hereon, an assignment within the meaning of this lease being understood and intended to comprehend not only the voluntary action of the Warehouse Company but also every levy or sale on execution, or other legal process, and every assignment or sale in bankruptcy or insolvency, or under any other compulsory procedure or order of court.

II a. To use all reasonable efforts to secure to the lines of The Pennsylvania Railroad Company's system, of which the railroad of Railroad Company forms part, all traffic controlled by it or destined to or from the warehouse aforesaid, and to accord to traffic passing over said lines, at all times, preference in the facilities furnished by the Warehouse Company over traffic passing over other lines; it being further understood that without the consent of the Railroad Company the said facilities shall not be extended to traffic passing over other lines.

b. To promptly load, unload and handle all freights received by it to be shipped over the lines of Railroad Company or received by it for delivery to consignees, and in the case of incoming freight to promptly notify consignees of the arrival thereof.

c. To be responsible to Railroad Company for the prompt collection of all freight and other charges upon

inbound freight, payment to be made by Warehouse Company to Railroad Company on the fifth day of each month of freight and other charges due on account of all freight delivered to it during the preceding month, excepting, however, any such charges which the Railroad Company may, from time to time, elect to collect direct from any consignee; and in order to secure Railroad Company, Warehouse Company shall furnish to it a bond with such good and sufficient sureties, and in such amount as shall be approved by Railroad Company, conditioned for the prompt payment of the said freight and other charges and for the performance by Warehouse Company of all its other covenants hereunder.

d. To indemnify and hold harmless Railroad Company for all damage to, or loss of, freights in its custody or control, and all liability by reason thereof, and to keep an adequate and sufficient line of fire insurance on all such freight.

e. To promptly notify Railroad Company in writing of the failure of any consignee to remove freight, and to observe and comply with all directions with respect to such freight which may be received by it from Railroad Company.

f. To protect and indemnify the Railroad Company from and against all manner of liability on account of any acts of omission or commission on the part of it, the said Warehouse Company, in respect to merchandise received by it at said warehouse, to be forwarded over the Railroad Company's lines or to be delivered to consignees, and also from and against all manner of liability on account of receipts for merchandise issued by it.

III. If, even without any previous demand, it shall fail or omit to pay the rents or sums hereby reserved

when the same are made payable or shall in any other respect violate or fail to comply with any of the conditions and covenants herein contained, then this lease, and the term hereby created and any renewal thereof shall at the option of the Railroad Company to be signified by a written notice of its intention so to determine this lease, on a day therein fixed, delivered to it, or left on the premises, at least thirty days previous to the day so fixed, determine and become absolutely void, without any right on its part after the day so fixed to save the forfeiture by payment of rent due, or by other performance of the condition or conditions thus violated. That when the lease shall be so determined by condition broken and notice as aforesaid, and also when and as soon as the term hereby created shall have expired, it shall be lawful for any attorney as attorney for Warehouse Company to sign an agreement for entering in any competent court an amicable action and judgment in ejectment (without any stay of execution) against it and all persons claiming under it for the recovery by the Railroad Company of the possession of the hereby demised premises, for which this shall be a sufficient warrant, whereupon, if the Railroad Company so desires, a writ of habere facias possessionem may issue forthwith, without any prior writ or proceedings whatsoever, it hereby releasing and agreeing to release the Railroad Company from all errors and defects whatsoever in entering such action or judgment or causing such possessory writ to be issued, or in any proceedings thereon, or concerning the same, and hereby agreeing that no writ of error or objection or exception shall be made or taken thereto, provided that the Railroad Company shall first cause to be filed in such action an affidavit made by some person in its behalf, setting forth the facts necessary to authorize the entry of such judgment according to the terms of this lease, and if a true copy of this lease

shall be annexed to such affidavit, it shall not be necessary to file the original as a warrant of attorney, any rule of court to the contrary notwithstanding. No such determination of this lease, nor taking nor recovering possession of the premises shall deprive the Railroad Company of any remedy or action against it, for rent or for damages, for the breach of any covenant herein contained, nor shall the bringing of any such action for rent or breach of covenant, nor the resort to any other remedy herein provided for the recovery of rent or damages for such breach be construed as a waiver of the right to insist upon the forfeiture and obtain possession in the manner hereinafter provided.

It is hereby mutually agreed:

1. That at the expiration of the period during which the Railroad Company shall currently allow freight to remain at its warehouses before delivery without charge to the consignee, freight delivered by the Railroad Company to the Warehouse Company which has not been delivered to the consignee or party entitled to receive the same, or which shall not by direction of said Railroad Company have been returned to the shipper thereof, or otherwise disposed of, shall be regarded and treated as stored with Warehouse Company by Railroad Company for account of the owners thereof, and thereupon the Warehouse Company shall be entitled to deal with the property and to make such charges for its custody as it may lawfully and properly do and shall be further entitled to dispose of the same in such manner and at such times as it may lawfully and properly do for the purpose of realizing its charges thereon.

2. The Warehouse Company shall have the right to renew this agreement for a further period of ten (10) years from the first day of July, nineteen hundred and

twenty-six (1926), under all the terms, covenants, conditions and provisions herein contained, upon giving to the Railroad Company six (6) months notice prior to the expiration of the term hereby created, but such renewal thereof shall not contain a provision for a renewal for a further period of ten years: Provided, however, that should the Railroad Company require the above demised premises or any part thereof for its corporate purposes it shall have the right upon giving six (6) months notice to the Warehouse Company to terminate this agreement at any time during the term hereby created or any renewal thereof and upon the expiration of the time mentioned in such notice this agreement and any renewal thereof shall absolutely determine and the Warehouse Company shall quit and deliver up possession of the said premises to the Railroad Company; in case of such determination by the Railroad Company and other warehouse facilities are provided by either the Railroad Company or the Warehouse Company to take the place of the above demised premises, and if the Warehouse Company shall occupy such new facilities, then the same terms, conditions, covenants and provisions pertaining to traffic and the handling of freight to and from the warehouse and the compensation therefor, as are contained in this agreement shall govern and control the traffic conditions and the handling of freight to and from the new warehouse facilities and the compensation therefor.

3. If, during the term of this lease, the warehouse is so injured by fire or other casualty not occurring through the Warehouse Company's negligence, that it is rendered wholly unfit for occupancy, and cannot be repaired within sixty days from the happening of such injury, then this lease shall cease and determine from the date of such injury. In such case the Warehouse Company shall pay the rent apportioned to the time of

injury and shall immediately surrender the whole of the leased premises to the Railroad Company who may enter upon and repossess the same. If such injury can be repaired within sixty days thereafter the Railroad Company may enter and repair, and this lease shall not be affected, except that the rent shall be apportioned and suspended while such repairs are being made; but if said warehouse shall be so slightly injured by fire or other casualty as not to be rendered unfit for occupancy, then the Railroad Company agrees that the same shall be repaired with reasonable promptitude, and in that case the rent accrued or accruing shall not cease or determine.

4. That if the terms and conditions of this agreement shall be found to work onerously to the interests of either party hereto, the said terms and conditions shall, at the written request of either party be subject to revision at the end of any period of two (2) years; and if the parties hereto cannot agree upon such revision, or any question shall arise as to the proper construction of any of the provisions herein contained, or differences as to any act or duty claimed to be involved in the performance hereof, if the same cannot be amicably adjusted then the same shall be settled by arbitration as follows:

The party demanding the reference shall serve upon the other party a notice of such demand, stating the question upon which it demands the judgment of the referees and the name of one referee by it chosen. The party so notified shall, within ten days after receiving such notice, select a second referee and notify the other party thereof in writing, or if it shall fail to select a referee, the referee selected by the party demanding the reference shall select the second referee. The referees so selected shall within a reasonable time meet and select a third referee and fix a time and place

for hearing the parties, of which they shall be notified in writing. If any referee shall refuse to act, the party by whom he was chosen shall select another to act in his place. The award of any two of said referees made after hearing the party or parties who have attended in compliance with the notice required to be given, as above stated, shall be final and binding on the parties, and they severally hereby expressly agree to be bound thereby.

That all the rights and liabilities herein given to or imposed upon either of the parties hereto shall extend to the successors and assigns of such party as though they were in each case named, unless whereof the assigns are expressly excluded from certain rights.

In Witness whereof the parties hereto have hereunto affixed their respective corporate seals, duly attested, the day and year first above written.

Philadelphia, Baltimore and Washington Railroad Company, by W. H. Myers, Vice-President. Attest: J. Taney Willcox, Asst. Secretary. Merchants Warehouse Company, by Harvey C. Miller, President. Attest: Charles Hay, Secretary. (Seal)

(Canceled 50-cent internal-revenue stamp.)

INDENTURE.

Pennsylvania Railroad Company and Merchants Warehouse Company.

THIS INDENTURE, made this 1st day of July nineteen hundred and sixteen (1916) between The Pennsylvania Railroad Company, hereinafter called "Railroad Company," of the one part, and the Merchants Warehouse Company, hereinafter called "Warehouse Company," of the other part.

Witnesseth, That the Railroad Company for and in consideration of the rents and covenants and agreements hereinafter mentioned, which on the part of the Warehouse Company are to be paid, kept and performed, hath demised and let and by these presents doth demise and let unto the Warehouse Company, all that certain lot or piece of land with the warehouse thereon erected, situated in the Twenty-seventh Ward of the City of Philadelphia, Beginning at a point distant thirty-nine and nine-tenths feet Southwardly, measured at right angles, from the south side of Chestnut Street, two hundred feet eight and one-half inches eastwardly from east side of Thirty-second Street, containing in front parallel with Chestnut Street and thirty-nine and nine-tenths feet distant southwardly therefrom, one hundred and ten and three-tenths feet and extending of that width in length or depth between parallel lines southward four hundred and forty and one-tenth feet to the north side of Walnut Street; together with the right of ingress and egress over other land of the Railroad Company lying between the herein demised premises and the south side of Chestnut Street, in common with the owners, tenants and occupants of said land at all times during the continuance of this lease.

To hold the said premises for and during the term of ten (10) years, from the first day of July, nineteen hundred and sixteen (1916), at and for the rent or sum of seven thousand dollars ($7,000.00) per year, to be paid in equal monthly payments, not in advance, on the first day of each and every month during said term; together with a further rental which shall be equal to the amount of all taxes, not exceeding the sum of fifteen hundred dollars ($1500.00) per year, and all the water rent and other assessments levied, assessed and payable against said premises, to be paid to the Railroad Company when demanded.

The Railroad Company hereby covenants and agrees to and with the Warehouse Company as follows:

A. To maintain railroad tracks adjacent to said warehouse, and to do the necessary shifting to enable its cars to reach the warehouse aforesaid for the purpose of taking from and delivering to the same all freight to be shipped therefrom or destined thereto, and shall and will take and deliver the same over its lines and at the same rates (except in case of traffic hauled short distances upon which it is customary for the Railroad Company to apply rates varying with respect to different station deliveries in the City of Philadelphia) and in the same manner and with the same promptness that it delivers and receives like traffic at any other terminal point controlled by it in the City of Philadelphia.

B. To pay to the Warehouse Company for all services rendered by it in and about the receipt and delivery of freight, both incoming and outgoing, thirty-five cents (35¢) per ton (of two thousand pounds) for each ton of merchandise, except that no payment shall be made upon bulk freight, nor upon freight the movement of which by the Railroad Company has been per-

formed at a switching rate, nor material and supplies belonging to the Railroad Company.

The Warehouse Company hereby covenants and agrees with the Railroad Company, viz:

I. To pay to the Railroad Company the rent hereby reserved on the days and times hereinbefore mentioned for the payment thereof, together with said further rental equal to the said amount of taxes and all water rent and other assessments levied or charged upon the said premises, and to keep the said demised premises in good order and repair during the continuance of this lease and at the end of the said term or sooner determination of said lease to peaceably deliver up possession of the said premises in the like good order and condition, ordinary wear and tear and casualties by fire and unavoidable accidents only excepted; and will not under penalty of forfeiture of this lease commit or suffer to be committed any act or thing whereby or in consequence whereof the conditions or stipulations of the policy or policies of insurance on the said premises shall become avoided or suspended; or occupy or permit to be occupied the said premises otherwise than as a warehouse for the storage of hay, straw, feed and other freight; it being agreed by the Warehouse Company that it will at all times provide sufficient space for the proper handling and storage of hay; that it will not assign this lease or the term hereby created or underlet the said premises or any part thereof, without the written consent of the Railroad Company endorsed hereon, an assignment within the meaning of this lease being understood and intended to comprehend not only the voluntary action of the Warehouse Company but also every levy or sale on execution or other legal process and every assignment or sale in bankruptcy or insolvency or under any other compulsory procedure or order of court; and that upon

the happening of any legal proceedings, the effect of which shall be to divest the title or possession of the Warehouse Company, this agreement shall be at the option of the Railroad Company cease and determine.

II. a. To use all reasonable efforts to secure to the lines of The Pennsylvania Railroad Company's system, of which the railroads of Railroad Company form part all traffic controlled by it or destined to or from the warehouse aforesaid, and to accord to traffic passing over said lines, at all times, preference in the facilities furnished by the Warehouse Company over traffic passing over other lines, it being further understood that without the consent of the Railroad Company the said facilities shall not be extended to traffic passing over other lines.

b. To promptly load and unload and handle all freight received by it to be shipped over the lines of Railroad Company, or received by it for delivery to consignee and in the case of incoming freight to promptly notify consignees of the arrival thereof.

c. To be responsible to Railroad Company for the prompt collection of all freight and other charges upon inbound freight, payment to be made by Warehouse Company to Railroad Company on the fifth day of each month of freight and other charges due on account of all freight delivered to it during the preceding month, excepting, however, any such charges which the Railroad Company may, from time to time, elect to collect direct from any consignee; and in order to secure Railroad Company, Warehouse Company shall furnish to it a bond with such good and sufficient sureties, and in such amount as shall be approved by Railroad Company, conditioned for the prompt payment of the said freight and other charges and for the

performance by Warehouse Company of all its other covenants hereunder.

d. To indemnify and hold harmless Railroad Company for all damage to, or loss of, freights in its custody or control, and all liability by reason thereof, and to keep an adequate and sufficient line of fire insurance on all such freight.

e. To promptly notify Railroad Company in writing of the failure of any consignee to remove freight, and to observe and comply with all directions with respect to such freight which may be received by it from Railroad Company.

f. To protect and indemnify Railroad Company from and against all manner of liability on account of any acts of omission or commission on the part of it, the said Warehouse Company, in respect to merchandise received by it at said Warehouse to be forwarded over the Railroad Company's lines or to be delivered to consignees and also from and against all manner of liability on account of receipts for merchandise issued by it.

It is hereby mutually understood and agreed:

1. That at the expiration of the period during which the Railroad Company shall currently allow freight to remain at its warehouses before delivery without charge to the consignees, freight delivered by the Railroad Company to the Warehouse Company which has not been delivered to the consignee, or party entitled to receive the same, or which shall not by direction of said Railroad Company have been returned to the shipper thereof, or otherwise disposed of, shall be regarded and treated as stored with Warehouse Company by Railroad Company for account of the

owners thereof, and thereupon the Warehouse Company shall be entitled to deal with the property and to make such charges for its custody as it may lawfully and properly do, and shall be further entitled to dispose of the same in such manner, and at such times, as it may lawfully and properly do, for the purpose of realizing its charges thereon.

2. If, during the term of this lease, the warehouse is so injured by fire or other casualty not occurring through the Warehouse Company's negligence that it is rendered wholly unfit for occupancy and cannot be repaired within sixty days from the happening of such injury, then this lease shall cease and determine from the date of such injury. In such case the Warehouse Company shall pay the rent apportioned to the time of injury, and shall immediately surrender the whole of the leased premises to the Railroad Company who may re-enter upon and repossess the same. If such injury can be repaired within sixty days thereafter the Railroad Company may enter and repair, and this lease shall not be affected, except that the rent shall be apportioned and suspended while such repairs are being made; but if said warehouse shall be so slightly injured by fire or other casualty as not to be rendered wholly unfit for occupancy, then the Railroad Company agrees that the same shall be repaired with reasonable promptitude and in that case the rent accrued or accruing shall not cease or determine.

3. The Warehouse Company shall have the right to renew this agreement for a further period of ten (10) years from the first day of July nineteen hundred and twenty-six (1926), under all the terms, covenants, conditions and provisions herein contained, upon giving to the Railroad Company six months notice prior to the expiration of the term hereby created, but such

renewal thereof shall not contain a provision for a renewal for a further period of ten years; Provided, however, that should the Railroad Company require the above demised premises or any part thereof for its corporate purposes it shall have the right upon giving ninety *days* notice to the Warehouse Company to terminate this agreement at any time during the term hereby created or any renewal thereof and upon the expiration of the time mentioned in such notice this agreement and any renewal thereof shall absolutely determine and the Warehouse Company shall quit and deliver up possession of the said premises to the Railroad Company; in case of such determination by the Railroad Company and other warehouse facilities are provided by either the Railroad Company or the Warehouse Company to take the place of the above demised premises, and if the Warehouse Company shall occupy such new facilities, then the same terms, conditions, covenants and provisions pertaining to traffic and the handling of freight to and from the warehouse and the compensation therefor, as are contained in this agreement shall govern and control the traffic conditions and the handling of freight to and from the new warehouse facilities and the compensation therefor.

4. If even without any previous demand, the Warehouse Company shall fail or omit to pay the rents or sums hereby reserved when the same are made payable or shall in any other respect violate or fail to comply with any of the conditions and covenants herein contained, then this lease and the tenancy thereunder shall, at the option of the Railroad Company, to be signified by a written notice of its intention so to determine this lease, on a day therein fixed, delivered to it, or left on the premises, at least thirty days previous to the day so fixed, determine and become absolutely

void, without any right on its part, after the day so fixed, to save the forfeiture by payment of rent due, or by other performance of the condition or conditions thus violated. That when the lease shall be so determined by condition broken and notice as aforesaid, it shall be lawful for any attorney as attorney for the Warehouse Company, to sign an agreement for entering in any competent court an amicable action and judgment in ejectment (without any stay of execution) against the Warehouse Company and all persons claiming under it for the recovery by the Railroad Company of the possession of the hereby demised premises, for which this shall be a sufficient warrant, whereupon, if the Railroad Company so desires, a writ of habere facias possessionem may issue forthwith, without any prior writ or proceedings whatsoever, the Warehouse Company hereby releasing and agreeing to release the Railroad Company from all errors and defects whatsoever in entering such action or judgment or causing such possessory writ to be issued, or in any proceedings thereon, or concerning the same, and hereby agreeing that no writ of error or objection or exception shall be made or taken thereto; Provided, that the Railroad Company shall first cause to be filed in such action an affidavit made by someone on its behalf, setting forth the facts necessary to authorize the entry of such judgment according to the terms of this lease, and if a true copy of this lease shall be annexed to such affidavit, it shall not be necessary to file the original as a warrant of attorney, any rule of court to the contrary notwithstanding. No such determination of this lease, nor taking or recovering possession of the premises shall deprive the Railroad Company of any remedy or action against the Warehouse Company for rent or for damages, for the breach of any covenant herein contained, nor shall the bringing of any such action for rent or for breach of covenant, nor the resort to

any other remedy herein provided for the recovery of rent or damages for such breach be construed as a waiver of its right to insist upon the forfeiture and obtain possession in the manner hereinbefore provided.

5. That if the terms and conditions of this agreement shall be found to work onerously to the interests of either party hereto, the said terms and conditions shall, at the written request of either party be subject to revision at the end of any period of two years; and if the parties hereto cannot agree upon such revision, or any question shall arise as to the proper construction of any of the provisions herein contained, or differences as to any act or duty claimed to be involved in the performance hereof, if the same cannot be amicably adjusted then the same shall be settled by arbitration as follows:

The party demanding the reference shall serve upon the other party a notice of such demand, stating the question upon which it demands the judgment of the referees and the name of one referee by it chosen. The party so notified shall, within ten days after receiving such notice, select a second referee and notify the other party thereof in writing, or if it shall fail to select a referee, the referee selected by the party demanding the reference shall select the second referee. The referees so selected shall within a reasonable time meet and select a third referee and fix a time and place for hearing the parties, of which they shall be notified in writing. If any referee shall refuse to act, the party by whom he was chosen shall select another to act in his place. The award of any two of said referees made after hearing the party or parties who have attended in compliance with the notice required to be given, as above stated, shall be final and binding on the parties, and they severally hereby expressly agree to be bound thereby.

That all the rights and liabilities herein given to or imposed upon either of the parties hereto shall extend to the successors and assigns of such party as though they were in each case named, unless where the assigns are expressly excluded from certain rights.

In witness whereof the parties hereto have hereunto affixed their respective corporate seal, duly attested, the day and year first above written.

The Pennsylvania Railroad Company, by W. H. Myers, Vice-President. Attest: Lewis Wilson, Secretary. (Seal) Merchants Warehouse Company, by Harvey C. Miller, President. Attest: Charles Hay, Secretary. (Seal).

(Cancelled 50-cent internal-revenue stamp.)

AGREEMENT.

Pennsylvania Railroad Company and Merchants' Warehouse Company.

THIS AGREEMENT made this twenty-fifth day of January in the year of our Lord one thousand nine hundred and seventeen (A. D. 1917) between The Pennsylvania Railroad Company, hereinafter called the "Railroad Company," party of the first part, and the Merchants' Warehouse Company, a corporation organized and existing under the laws of the State of Pennsylvania, hereinafter called the "Warehouse Company," party of the second part;

Whereas the parties hereto desire to enter into an agreement with respect to the handling and storage of flour, grain and other merchandise at the warehouses of the said Warehouse Company situated on the plot of land bounded by Delaware Avenue, Walnut, Water and Chestnut Streets, in the City of Philadelphia, and State of Pennsylvania;

Now, therefore, this agreement witnesseth:

First. That the Railroad Company covenants and agrees:

(a) To maintain railroad tracks adjacent to the Warehouse Company's said warehouses situated on said plot of land, and to promptly do the necessary shifting to enable its cars to reach the warehouses aforesaid for the purpose of taking from and delivering to the same all freight to be shipped therefrom or destined thereto and shall and will take and deliver the same over its lines, at non-discriminatory rates, and in the same manner and with the same promptness that

it delivers and receives like traffic at any other terminal point controlled by it in the City of Philadelphia.

(b) To pay to the said Warehouse Company for all services rendered by it in and about the receipt and delivery of freight for account of the Railroad Company, both incoming and outgoing at the said warehouses the amounts following: Three and one-half cents (3½¢) per barrel for each barrel of flour up to fifty thousand (50,000) barrels per month, two and one-half cents (2½¢) per barrel for each barrel over the said fifty thousand (50,000) barrels per month, and during the first two years of the life of this agreement, forty cents (40¢) per ton (of 2,000 pounds) for each ton of merchandise, and during the following years that the agreement is in force, thirty-five cents (35¢) per ton (of 2,000 pounds) for each ton of merchandise, except that no payment shall be made upon bulk freight nor upon freight the movement of which by the Railroad Company has been performed at a switching rate, nor upon material and supplies belonging to the Railroad Company.

(c) That so long as this contract is in force it will not enter into any contract with any other person or corporation, making any allowance for terminal services in connection with the loading and unloading of merchandise to or from the warehouses located within the City of Philadelphia, nor shall it during the same time engage in the business of warehousing merchandise in the City of Philadelphia, except as hereinafter provided. Provided, however, that this covenant shall not be construed so as to prevent the Railroad Company from warehousing freight in its terminals as an incident to delivery thereof or from entering into contracts for storage or other disposition of refused or unclaimed freight, nor shall it be so construed as to in-

terfere with the performance by the Railroad Company of all obligations imposed upon it by law in respect to the carriage, storage or delivery of traffic. Provided, further, that in the event of the Railroad Company building any additional storage warehouses within the City of Philadelphia, either in connection with its freight stations or otherwise, the Warehouse Company shall have the option of renting or leasing such storage warehouse at a fair rental fixed by the Railroad Company, which option must be exercised by the Warehouse Company within sixty days after the same is offered to it by the Railroad Company; and only in the event of the Warehouse Company not being able or willing to undertake the operation of such warehouse, or warehouses, shall the Railroad Company be at liberty to engage in the business of warehousing merchandise in said warehouses, and in the event of the Railroad Company engaging in such warehouse business the same shall be conducted on a commercial basis with due regard to the current storage rates at similar warehouses in the city of Philadelphia.

Second. The Warehouse Company covenants and agrees:

(a) To at all times accord to traffic passing over the lines of the Pennsylvania Railroad Company's System, of which the railroads of the Railroad Company form part, preference in the facilities furnished by the Warehouse Company over traffic passing over other lines; it being understood that without the consent of the Railroad Company the said facilities shall not be extended to traffic passing over other lines.

(b) To promptly load and unload and handle all freight received by it to be shipped over the lines of the Railroad Company or received by it for delivery to consignees, and in the case of incoming freight to promptly notify the consignees of the arrival thereof.

(c) To be responsible to the Railroad Company for the prompt collection of all freight and other charges upon inbound freight, payment to be made by the Warehouse Company to the Railroad Company on the fifth day of each month of freight and other charges due on account of all freight delivered to it during the preceding month, excepting, however, any such charges which the Railroad Company may, from time to time elect to collect direct from any consignee; and in order to secure the Railroad Company, the Warehouse Company shall furnish to it a bond with such good and sufficient sureties, and in such amount, as shall be approved by the Railroad Company, conditioned for the prompt payment of the said freight and other charges and for the performance by the Warehouse Company of all its other covenants hereunder.

(d) To indemnify and hold harmless the Railroad Company for all damage to, or loss of, freights in the custody or control of the Warehouse Company, and all liability by reason thereof, and to keep an adequate and sufficient line of fire insurance on all such freight to cover the liability of the Railroad Company therefor.

(e) To promptly notify the Railroad Company in writing of the failure of any consignee to remove freight, and, so long as it holds the said freight for account of the Railroad Company, to observe and comply with all directions with respect to such freight which may be received by it from the Railroad Company.

(f) To protect and indemnify the Railroad Company from and against all manner of liability on account of any acts of omission or commission on the part of it, the said Warehouse Company, in respect to merchandise received by it at said warehouses, to be forwarded over the Railroad Company's lines or to be

delivered to consignees, and also from and against all manner of liability on account of receipts for merchandise issued by it.

(g) To keep its said warehouses in good order and repair and properly equipped for the prompt and effective handling of the traffic delivered to and received by it.

Third. It is hereby mutually agreed that at the expiration of the period during which the Railroad Company shall currently allow freight to remain at its warehouses before delivery without charge to the consignees, freight delivered by the Railroad Company to the Warehouse Company which has not been delivered to the consignee, or party entitled to receive the same, or which shall not by direction of said Railroad Company have been returned to the shipper thereof, or otherwise disposed of, shall be regarded and treated as stored with Warehouse Company by Railroad Company for account of the owners thereof, and thereupon the Warehouse Company shall be entitled to deal with the property and to make such charges for its custody as it may lawfully and properly do, and shall be further entitled to dispose of the same in such manner, and at such times, as it may lawfully and properly do for the purpose of realizing its charges thereon.

Fourth. It is further agreed that no assignment of this agreement shall be valid without the consent of the Railroad Company, and that this shall apply as well to involuntary assignments, and that upon the happening of any legal proceedings the effect of which shall be to divest the title or possession of the said Warehouse Company, this agreement shall, at the option of the Railroad Company, cease and determine: Provided, however, that nothing contained in this paragraph

Fourth shall be construed to prevent the assigning of the income and revenues to the Merchants' Warehouse Company from this agreement as additional security for mortgage bonds to be issued by the said Warehouse Company.

Fifth. This agreement shall take effect as of the first day of February, A. D. 1917, and shall continue in full force and effect for the term of twenty (20) years from said date, that is, until the first day of February, A. D. 1937, and thereafter from year to year unless and until terminated at the end of said period of twenty (20) years or at the end of any one year thereafter by either of the said parties hereto giving six (6) months previous written notice to the other of its intention so to do; Provided, however, that should the Warehouse Company in any respect violate or fail to comply with any of the conditions and covenants herein contained, then this agreement shall, at the option of the Railroad Company, on thirty (30) days written notice to the Warehouse Company, cease and determine and become absolutely void.

Sixth. That if the terms and conditions of this agreement shall be found to work onerously to the interests of either party hereto, the said terms and conditions shall, at the written request of either party, be subject to revision at the end of any period of two years; and if the parties hereto cannot agree upon such revision, or any question shall arise as to the proper construction of any of the provisions herein contained, or difference as to any act or duty claimed to be involved in the performance hereof, if the same cannot be amicably adjusted, then the same shall be settled by arbitration as follows: The party demanding the reference shall serve upon the other party a notice of such demand, stating the question upon which it demands the judgment of the references, and the name

of one referee by it chosen. The party so notified shall, within ten days after receiving such notice, select a second referee, and notify the other party thereof in writing or if he shall fail to select a referee, the referee selected by the party demanding the reference shall select the second referee. The referees so selected shall within a reasonable time meet and select a third referee, and fix a time and place for hearing the parties, of which they shall be notified in writing. If any referee shall refuse to act, the party by whom he was chosen shall select another to act in his place. The award of any two of said references made after hearing the party or parties who have attended in compliance with the notice required to be given, as above stated, shall be final and binding on the parties, and they severally hereby expressly agree to be bound thereby.

Seventh. This agreement and all its provisions shall be binding upon and enure to the benefit of the successors and assigns of each of the parties hereto.

In witness whereof the said parties hereto have hereunto affixed their respective corporate seals, duly attested, the day and year first above written.

The Pennsylvania Railroad Company, by Geo. D. D. Moy, Vice-President. Attest: J. ..... Wilson, Assistant Secretary. Merchants' Warehouse Company, by Harvey C. Willis, President. Attest: Jacob M. ....., Jr., Act. Secretary.

Signed, sealed and delivered in the presence of ..... (Endorsed:) James Gallagher et al. vs. The P. R. R. Co. I. C. C. Docket No. 20968. Exhibit No. ..... Witness: .... Document must be returned to the office of the secretary, Broad Street station, Philadelphia. A4125. Agreement be-

tween The Pennsylvania Railroad Company and Merchants' Warehouse Company providing for the handling of freight and collection of charges thereon at warehouse located at Delaware Avenue, Water, Walnut and Chestnut Streets, Philadelphia, Pa. Dated 25th January, 1917. The Pennsylvania Railroad Company.

Know all men by these presents that the Merchants' Warehouse Company, a corporation organized and existing under the Laws of the State of Pennsylvania (hereinafter called the Warehouse Company), as Principal, and Indemnity Insurance Company of North America, a corporation organized and existing under the laws of the State of Pennsylvania as surety, obligors, are held and firmly bound unto The Pennsylvania Railroad Company (hereinafter called the Railroad Company), obligees, in the sum of Two Thousand (2,000) Dollars, lawful money of the United States of America, to be paid to the said The Pennsylvania Railroad Company, its certain attorneys, successors or assigns, to which payment, well and truly to be made the said obligors do bind themselves and each of them, their and each of their successors and assigns, jointly and severally, firmly by these presents Sealed with their seals and dated the twenty-eighth day of July in the year of our Lord one thousand nine hundred and twenty-seven (A. D. 1927).

Whereas, the above named Warehouse Company has entered into a certain agreement with the said Railroad Company bearing date of twenty-eighth day of July A. D. 1927, (a copy of which agreement is hereto attached and made a part hereof as fully and with the same effect as if herein fully set forth) with respect to the handling and storage of flour, grain and other merchandise at the warehouse of the said Warehouse Company situated on the plot of land bounded by Delaware Avenue, Kenilworth Street, Penn Street and Bain-

bridge Street, in the City of Philadelphia and State of Pennsylvania.

And whereas, it is in said agreement provided "in order to secure the Railroad Company, the Warehouse Company shall furnish to it a bond with such good and sufficient securities and in such amount as shall be approved by the Railroad Company, conditioned for the prompt payment of the said freight and other charges and for the performance by the Warehouse Company of all its other covenants hereunder.

Now the condition of this obligation is such that if the above bounden Warehouse Company shall and do make prompt payment of the said freight and other charges in said agreement called for, and shall and do perform all its other covenants and each and every covenant in said agreement provided for by it to be performed according to the true intent, purpose and meaning of the said agreement, then the obligation is to be void, otherwise to be and remain in full force and virtue.

Merchants' Warehouse Company, by Harvey C. Miller, President. Attest: S. Townsend Zook, Secretary. Indemnity Insurance Company of North America, by M. M. Dickinson, M. M. Dickinson, Attorney-in-Fact.

Signed, sealed and delivered in the presence of: M. M. Feeley.

AGREEMENT.

Pennsylvania Railroad Company and Merchants Warehouse Company.

THIS AGREEMENT, made this 3rd day of July, nineteen hundred and eighteen (1918) between The Pennsylvania Railroad Company, hereinafter called "Railroad Company," of the one part, and the Merchants Warehouse Company, hereinafter called "Warehouse Company," of the other part,

Witnesseth, That the Railroad Company for and in consideration of the rents and covenants and agreements hereinafter mentioned, which on the part of the Warehouse Company are to be paid, kept and performed, hath demised and let and by these presents doth demise and let unto the Warehouse Company, all those certain second, third and fourth floors and the basement of the New four-story and basement freight station erected by Railroad Company at Front and Federal Streets, Philadelphia, Pennsylvania; together with the right of ingress and egress to and from the demised premises and the street by means of the first floor of said building, by such passageways as the Railroad Company may from time to time prescribe;

To hold the said premises for and during the term of one (1) year, from the first day of July, nineteen hundred and eighteen (1918) and ending the first day of July, nineteen hundred and nineteen (1919), at and for the rent or sum of eleven thousand dollars ($11,000.00) per year, to be paid in equal monthly payments, not in advance, of the first day of each and every month during the said term.

The Railroad Company hereby covenants and agrees to and with the Warehouse Company, as follows:

A. To maintain railroad tracks adjacent to the said warehouse and to promptly do the necessary shifting to enable its cars to reach the warehouse aforesaid for the purpose of taking from and delivering to the same all freight for account of the Warehouse Company to be shipped therefrom or destined thereto and shall and will take and deliver the same over its lines, at non-discriminatory rates, and in the same manner and with the same promptness that it delivers and receives like traffic at any other terminal point controlled by it in the City of Philadelphia.

B. To pay to the Warehouse Company for all services rendered by it in and about the receipt and delivery of freight for account of the Railroad Company, both incoming and outgoing, thirty-five cents (35¢) per ton (of two thousand pounds) for each ton of merchandise, except that no payment shall be made upon bulk freight nor upon freight the movement of which by the Railroad Company has been performed at a switching rate.

The Warehouse Company hereby covenants and agrees to and with the Railroad Company, as follows:

I. To pay to the Railroad Company the rent hereby reserved on the days and times hereinbefore mentioned for the payment thereof, together with a further sum to be paid to the Railroad Company when demanded which shall be equal to all charges for light, heat, power for elevators and for similar services furnished by Railroad Company, and to keep the said demised premises in good order and repair during the said term and at the end of said term or sooner determination of this

lease to peaceably deliver up possession of the said demised premises in the like good order and condition, ordinary wear and tear and casualties by fire and unavoidable accidents only excepted; and will not under penalty of forfeiture of this lease commit or suffer to be committed any act or thing whereby or in consequence whereof the conditions or stipulations of policy or policies of insurance on the said premises shall become avoided or suspended; or occupy or permit to be occupied the said demised premises otherwise than as a warehouse for the storage of merchandise; that it will not assign this lease or the term hereby created or underlet the demised premises or any part thereof, an assignment within the meaning of this lease being understood and intended to comprehend not only the voluntary action of the Warehouse Company but also every levy or sale on execution or other legal process and every assignment or sale in bankruptcy or insolvency or under any other compulsory procedure or order of court; and that upon the happening of any legal proceedings, the effect of which shall be to divest the title or possession of the Warehouse Company, this agreement shall at the option of the Railroad Company cease and determine; Provided, however, that nothing herein contained shall be construed as preventing the Warehouse Company from sub-letting to its customers under and subject to all the terms and conditions of this lease, office space and other space reasonably sufficient for business or its customers in the demised premises; provided, further, that this limited privilege of sub-letting shall not be construed as authorizing the sub-letting as an entirety of the demised premises, or of assigning this lease.

II. a. To at all times accord to traffic passing over the lines of The Pennsylvania Railroad Company's

System, of which the railroads of Railroad Company form part, preference in the facilities furnished by the Warehouse Company over traffic passing over other lines; it being understood that without the consent of the Railroad Company the said facilities shall not be extended to traffic passing over other lines.

b. To promptly load and unload and handle all freight received by it for storage in the said warehouse and later to be shipped over the lines of the Railroad Company or received by it for storage and delivery later to consignees, and in the case of incoming freight to be stored, to promptly notify consignee of the arrival thereof.

c. To be responsible to the Railroad Company for the prompt collection of all freight and other charges upon inbound freight stored in its warehouse, payment to be made by the Warehouse Company to the Railroad Company on the fifth day of each month of freight and other charges due on account of all freight delivered to it during the preceding month, excepting, however, any such charges which the Railroad Company may, from time to time, elect to collect direct from any consignee; and in order to secure the Railroad Company, the Warehouse Company shall furnish to it a bond with such good and sufficient sureties, and in such amount, as shall be approved by the Railroad Company, conditioned for the prompt payment of the said freight and other charges and for the performance by the Warehouse Company of all its other covenants hereunder.

d. To indemnify and hold harmless the Railroad Company for all damages to, or loss of, freights in its custody or control, and all liability by reason thereof, and to keep an adequate and sufficient line of fire insurance on all such freight to cover the liability of the Railroad Company therefor.

e. To protect and indemnify the Railroad Company from and against all manner of liability on account of any acts of omission or commission on the part of it, the said Warehouse Company, in respect to merchandise received by it at said warehouse, to be forwarded over the Railroad Company's lines or to be delivered to consignees, and also from and against all manner of liability on account of receipts for merchandise issued by it.

It is hereby mutually understood and agreed:

1. That at the expiration of the period during which the Railroad Company shall currently allow freight to remain at its warehouses before delivery without charge to consignees, freight delivered by the Railroad Company to the Warehouse Company which has not been delivered to the consignee, or party entitled to receive the same, or which shall not by direction of said Railroad Company have been returned to the shipper thereof or otherwise disposed of, shall be regarded and treated as stored with Warehouse Company by Railroad Company for account of the owners thereof, and thereupon the Warehouse Company shall be entitled to deal with the property and to make such charges for its custody as it may lawfully and properly do, and shall be further entitled to dispose of the same in such manner, and at such times as it may lawfully and properly do for the purpose of realizing its charges thereon.

2. If, during the term of this lease, the warehouse is so injured by fire or other casualty not occurring through the Warehouse Company's negligence, that it is rendered wholly unfit for occupancy and cannot be repaired within sixty days from the happening of such injury, then this lease shall cease and determine from

the date of such injury. In such case the Warehouse Company shall pay the rent apportioned to the time of injury and shall immediately surrender the whole of the leased premises to the Railroad Company who may re-enter upon and repossess the same. If such injury can be repaired within sixty days thereafter the Railroad Company may enter and repair and this lease shall not be affected, except that the rent shall be apportioned and suspended while such repairs are being made; but if said warehouse shall be so slightly injured by fire or other casualty as not to be rendered wholly unfit for occupancy, then the Railroad Company agrees that the same shall be repaired with reasonable promptitude and in that case the rent accrued or accruing shall not cease or determine.

3. If, even without any previous demand, the Warehouse Company shall fail or omit to pay the rents or sums hereby reserved when and as the same are made payable or shall in any other respect violate or fail to comply with any of the conditions and covenants herein contained, then this lease and tenancy thereunder shall, at the option of the Railroad Company, to be signified by a written notice of its intention so to determine this lease, on a day therein fixed, delivered to it, or left on the premises, at least thirty days previous to the day so fixed, determine and become absolutely void, without any right on its part, after the day so fixed, to save the forfeiture by payment of rent due or by other performance of the condition or conditions thus violated. That when the lease shall be so determined by condition broken and notice as aforesaid, it shall be lawful for any attorney as attorney for the Warehouse Company to sign an agreement for entering in any competent court an amicable action and judgment in ejectment (without any stay of execution) against the Warehouse Company and all persons claiming under it for the re-

covery by the Railroad Company of possession of the hereby demised premises, for which this shall be a sufficient warrant, whereupon, if the Railroad Company so desires, a writ of habere facias possessionem may issue forthwith, without any prior writ or proceedings whatsoever, the Warehouse Company hereby releasing and agreeing to release the Railroad Company from all errors and defects whatsoever in entering such action or judgment or causing such possessory writ to be issued, or in any proceedings thereon or concerning the same, and hereby agreeing that no writ of error or objection or exception shall be made or taken thereto; Provided, that the Railroad Company shall first cause to be filed in such action an affidavit made by some one on its behalf setting forth the facts necessary to authorize the entry of such judgment according to the terms of this lease, and if a true copy of this lease shall be annexed to such affidavit, it shall not be necessary to file the original as warrant of attorney, any rule of court to the contrary notwithstanding. No such determination of this lease, nor taking or recovering possession of the premises shall deprive the Railroad Company of any remedy or action against the Warehouse Company for rent or for damages, for the breach of any covenant herein contained, nor shall the bringing of any such action for rent or for breach of covenant, nor the resort to any other remedy herein provided for the recovery of rent or damages for such breach be construed as a waiver of its right to insist upon the forfeiture and obtain possession in the manner hereinabove provided.

That all the rights and liabilities herein given to or imposed upon either of the parties hereto shall extend to the successors and assigns of such party as though they were in each case named, unless where the assigns are expressly excluded from certain rights.

In witness whereof the parties hereto have hereunto affixed their respective corporate seals, duly attested, the day and year first above written.

The Pennsylvania Railroad Company, by W. H. Myers, Vice-President. Attest: Robt. H. Groff, Asst. Secretary. (Seal) Merchants Warehouse Company, by Harvey C. Miller, President. Attest: Jacob Michel, Jr., Secretary. (Seal)

M. L. Donodien, Jr.

AGREEMENT.

Pennsylvania Railroad Company and Merchants' Warehouse Company.

THIS AGREEMENT made this tenth day of April in the year of our Lord one thousand nine hundred and twenty-two (A. D. 1922) between the Pennsylvania Railroad Company, hereinafter called the "Railroad Company," party of the first part, and the Merchants' Warehouse Company, a corporation organized and existing under the laws of the State of Pennsylvania, hereinafter called the "Warehouse Company," party of the second part;

Whereas, the parties hereto desire to enter into an agreement with respect to the handling and storage of flour, grain and other merchandise at the warehouse of the said Warehouse Company situated at the northeast corner of Front and Bainbridge Streets, in the City of Philadelphia, and State of Pennsylvania;

Now, therefore, this agreement witnesseth:

First. That the Railroad Company covenants and agrees:

(a) To maintain railroad tracks adjacent to the Warehouse Company's said warehouse, and to promptly do the necessary shifting to enable its cars to reach the warehouse aforesaid for the purpose of taking from and delivering to the same all freight to be shipped therefrom or destined thereto and shall and will take and deliver the same over its lines, at nondiscriminatory rates, and in the same manner and with the same promptness that it delivers and receives like traffic at any other terminal point controlled by it in the City of Philadelphia.

(b) To pay to the said Warehouse Company for all services rendered by it in and about the receipt and delivery of freight for account of the Railroad Company, both incoming and outgoing at the said warehouse the amount following: Three and one-half cents (3½¢) per barrel for each barrel of flour up to fifty thousand (50,000) barrels per month; two and one-half cents (2½¢) per barrel for each barrel over the said fifty thousand (50,000) barrels per month, and thirty five cents (35¢) per ton (of 2,000 pounds) for each ton of merchandise, provided, however, that no payment shall be made by the Railroad Company for freight, which, upon arrival at its destination, is or has been unclaimed or refused by the consignee and has been stored with the Warehouse Company for account of the owners thereof, nor upon bulk freight, nor upon freight the movement of which by the Railroad Company has been performed at a switching rate, nor upon material and supplies belonging to the Railroad Company.

Second: The Warehouse Company covenants and agrees:

(a) To at all times accord to traffic passing over the lines of the Pennsylvania Railroad Company's System, of which the railroads of the Railroad Company form part, preference in the facilities furnished by the Warehouse Company over traffic passing over other lines; it being understood that without the consent of the Railroad Company the said facilities shall not be extended to traffic passing over other lines.

(b) To promptly load and unload and handle all freight received by it to be shipped over the lines of the Railroad Company or received by it for delivery to consignees, and in the case of incoming freight to promptly notify the consignees of the arrival thereof.

(c) To be responsible to the Railroad Company for the prompt collection of all freight and other charges upon inbound freight, payment to be made by the Warehouse Company to the Railroad Company on the fifth day of each month of freight and other charges due on account of all freight delivered to it during the preceding month, excepting, however, any such charges which the Railroad Company may, from time to time, elect to collect direct from any consignee; and in order to secure the Railroad Company, the Warehouse Company shall furnish to it a bond with such good and sufficient sureties, and in such amount, as shall be approved by the Railroad Company, conditioned for the prompt payment of the said freight and other charges and for the performance by the Warehouse Company of all its other covenants hereunder.

(d) To indemnify and hold harmless the Railroad Company for all damage to, or loss of, freight in the custody or control of the Warehouse Company, and all liability by reason thereof, and to keep an adequate and sufficient line of fire insurance on all such freight to cover the liability of the Railroad Company therefor.

(e) To promptly notify the Railroad Company in writing of the failure of any consignee to remove freight, and, so long as it holds the said freight for account of the Railroad Company, to observe and comply with all directions with respect to such freight which may be received by it from the Railroad Company.

(f) To protect and indemnify the Railroad Company from and against all manner—be forwarded over the Railroad Company's lines or to be delivered to consignees, and also from and against all manner of liability on account of receipts for merchandise issued by it.

(g) To keep its said warehouse in good order and repair and properly equipped for the prompt and effective handling of the traffic delivered to and received by it.

Third. It is hereby mutually agreed that at the expiration of the period during which the Railroad Company shall currently allow freight to remain at its freight stations before delivery without charge to the consignees, freight delivered by the Railroad Company to the Warehouse Company which has not been delivered to the consignee, or party entitled to receive the same, or which shall not by direction of said Railroad Company have been returned to the shipper thereof, or otherwise disposed of, shall be regarded and treated as stored with Warehouse Company by Railroad Company for account of the owners thereof, and thereupon the Warehouse Company shall be entitled to deal with the property and to make such charges for its custody as it may lawfully and properly do, and shall be further entitled to dispose of the same in such manner, and at such times, as it may lawfully and properly do for the purpose of realizing its charges thereon.

Fourth: It is further agreed that no assignment of this agreement shall be valid without the consent of the Railroad Company, and that this shall apply as well to involuntary assignments, and that upon the happening of any legal proceedings the effect of which shall be to divest the title or possession of the said Warehouse Company, this agreement, shall, at the option of the Railroad Company, cease and determine; Provided, however, that nothing contained in this paragraph Fourth shall be construed to prevent the assigning of the income and revenues to the Merchants'

Warehouse Company from this agreement as additional security for mortgage bonds to be issued by the said Warehouse Company.

Fifth: This agreement shall take effect as of the seventeenth day of June, A. D. 1922, and shall continue in full force and effect for the term of three (3) years from said date, and thereafter from year to year unless and until terminated at the end of said period of three years or at the end of any one year thereafter by either of the said parties hereto giving six (6) months previous written notice to the other of its intention so to do: Provided, however, that should the Warehouse Company in any respect violate or fail to comply with any of the conditions and covenants herein contained, then this agreement shall, at the option of the Railroad Company, on thirty (30) days' written notice to the Warehouse Company, cease and determine and become absolutely void.

Sixth. This agreement shall be construed to be only applicable to the warehouse situate at the northeast corner of Front and Bainbridge Streets, as aforesaid, and in no wise or manner as impairing or affecting the terms and conditions of any other contract between the parties hereto in connection with any other premises. In the event of any arbitration being demanded and held under the provisions of any other agreement now existing between the parties, this agreement shall not be received or read in evidence before the arbitrators for any purpose whatsoever.

Seventh. This agreement and all its provisions shall be binding upon and enure to the benefit of the successors and assigns of each of the parties hereto.

In witness whereof the said parties hereto have hereunto affixed their respective corporate seals, duly attested, the day and year first above written.

The Pennsylvania Railroad Company, by Geo. D. D. Moy, Vice-President. Attest: E. Wilson, Secretary. Merchants' Warehouse Company, by Harvey C. Mills, President. Attest: S. Townsend Zook, Secretary.

Signed, sealed and delivered in the presence of George M. Richardson, Luowden Henry.

(Endorsed:) James Gallagher et al. vs. The P. R. R. Co. I. C. C. Docket No. 20968. Exhibit No. ..... Witness: ..... Document must be returned to the Office of the Secretary, Broad Street Station, Philadelphia. A4730. Agreement between The Pennsylvania Railroad Company and Merchants' Warehouse Company, Dated 10th April, 1922; Providing for the handling and storage of flour, grain and other merchandise at the warehouse of the said Warehouse Company at the northeast corner of Front and Bainbridge streets, Philadelphia, Pa., for 3 years from 17th April, 1922 and thereafter from year to year until terminated on six months' notice. Bond in the sum of $2,000. With The Guarantee Company of North America, surety attached. The Pennsylvania Railroad Company. C-3333.

AGREEMENT.

Pennsylvania Railroad Company and Merchants' Warehouse Company.

THIS AGREEMENT made this 4th day of March in the year of our Lord one thousand nine hundred and twenty-five (A. D. 1925) between the Pennsylvania Railroad Company, hereinafter called the "Railroad Company," party of the first part, and the Merchants' Warehouse Company, a corporation organized and existing under the laws of the State of Pennsylvania, hereinafter called the "Warehouse Company," party of the second part:

Whereas, the parties hereto desire to enter into an agreement with respect to the handling and storage of flour, grain and other merchandise at the warehouse of the said Warehouse Company, designated as Kenilworth Stores, situate at Bainbridge, Front and Kenilworth and Penn Streets, in the City of Philadelphia, and State of Pennsylvania.

Now, therefore, this agreement witnesseth:

First. That the Railroad Company covenants and agrees:

(a) To maintain railroad tracks adjacent to the Warehouse Company's said warehouse, and to promptly do the necessary shifting to enable its cars to reach the warehouse aforesaid for the purpose of taking from and delivering to the same all freight to be shipped therefrom or destined thereto and shall and will take and deliver the same over its lines, at non-discriminatory rates, and in the same manner and with the same promptness that it delivers and receives like traffic at any other terminal point controlled by it in the City of Philadelphia.

(b) To pay to the said Warehouse Company for all services rendered by it in and about the receipt and delivery of freight for account of the Railroad Company, both incoming and outgoing at the said warehouses the amount following: Three and one-half cents (3½¢) per barrel for each barrel of flour up to fifty thousand (50,000) barrels per month two and one-half cents (2½¢) per barrel for each barrel over the said fifty thousand (50,000) barrels per month, and thirty-five cents per ton (of 2,000 pounds) for each ton of merchandise, provided, however, that no payment shall be made by the Railroad Company for freight, which, upon arrival at its destination, is or has been unclaimed or refused by the consignee and has been stored with the Warehouse Company for account of the owners thereof, nor upon bulk freight, nor upon freight the movement of which by the Railroad Company has been performed at a switching rate, nor upon material and supplies belonging to the Railroad Company.

Second. The Warehouse Company covenants and agrees:

(a) To at all times accord to traffic passing over the lines of the Pennsylvania Railroad Company's system, of which the railroads of the Railroad Company form part, preference in the facilities furnished by the Warehouse Company over traffic passing over other lines; it being understood that without the consent of the Railroad Company the said facilities shall not be extended to traffic passing over other lines.

(b) To promptly load and unload and handle all freight received by it to be shipped over the lines of the Railroad Company or received by it for delivery to consignees, and in the case of incoming freight to promptly notify the consignees of the arrival thereof.

(c) To be responsible to the Railroad Company for the prompt collection of all freight and other charges upon inbound freight, payment to be made by the Warehouse Company to the Railroad Company on the fifth day of each month of freight and other charges due on account of all freight delivered to it during the preceding month, excepting, however, any such charges which the Railroad Company may, from time to time, elect to collect direct from any consignee; and in order to secure the Railroad Company the Warehouse Company shall furnish to it a bond with such good and sufficient sureties, and in such amount, as shall be approved by the Railroad Company, conditioned for the prompt payment of the said freight and other charges and for the performance by the Warehouse Company of all its other covenants hereunder.

(d) To indemnify and hold harmless the Railroad Company for all damage to, or loss of, freight in the custody or control of the Warehouse Company, and all liability by reason thereof, and to keep an adequate and sufficient line of fire insurance on all such freight to cover the liability of the Railroad Company therefor.

(e) To promptly notify the Railroad Company in writing of the failure of any consignee to remove freight, and, so long as it holds the said freight for account of the Railroad Company, to observe and comply with all directions with respect to such freight which may be received by it from the Railroad Company.

(f) To protect and indemnify the Railroad Company from and against all manner of liability on account of any acts of omission or commission on the part of it, the said Warehouse Company, in respect to merchandise received by it at said warehouse, to be

forwarded over the Railroad Company's lines or to be delivered to consignees, and also from and against all manner of liability on account of receipts for merchandise issued by it.

(g) To keep its said warehouse in good order and repair and properly equipped for the prompt and effective handling of the traffic delivered to and received by it.

Third. It is hereby mutually agreed that at the expiration of the period during which the Railroad Company shall currently allow freight to remain at its freight stations before delivery without charge to the consignees, freight delivered by the Railroad Company to the Warehouse Company which has not been delivered to the consignee, or party entitled to receive the same, or which shall not by direction of said Railroad Company have been returned to the shipper thereof, or otherwise disposed of, shall be regarded and treated as stored with Warehouse Company by Railroad Company for account of the owners thereof, and thereupon the Warehouse Company shall be entitled to deal with the property and to make such charges for its custody as it may lawfully and properly do, and shall be further entitled to dispose of the same in such manner, and at such times, as it may lawfully and properly do for the purpose of realizing its charges thereon.

Fourth. It is further agreed that no assignment of this agreement shall be valid without the consent of the Railroad Company, and that this shall apply as well as involuntary assignments, and that upon the happening of any legal proceedings the effect of which shall be to divest the title or possession of the said Warehouse Company, this agreement shall, at the op-

tion of the Railroad Company, cease and determine; Provided, however, that nothing contained in this paragraph Fourth shall be construed to prevent the assigning of the income and revenues to the Merchants' Warehouse Company from this agreement as additional security for mortgage bonds to be issued by the said Warehouse Company.

Fifth. This agreement shall take effect as of the 23rd day of March (A. D. 1925), and shall continue in full force and effect for the term of three (3) years from said date, and thereafter from year to year unless and until terminated at the end of said period of three years or at the end of any one year thereafter by either of the said parties hereto giving six (6) months previous written notice to the other of its intention so to do: Provided, however, that should the Warehouse Company in any respect violate or fail to comply with any of the conditions and covenants herein contained, then this agreement shall, at the option of the Railroad Company, on thirty (30) days written notice to the Warehouse Company, cease and determine and become absolutely void.

Sixth. This agreement shall be construed to be only applicable to the warehouse designated as Kenilworth Stores, situate at Bainbridge, Front, Kenilworth and Penn Streets, as aforesaid and in no wise or manner as impairing or affecting the terms and conditions of any other contract between the parties hereto in connection with any other premises. In the event of any arbitration being demanded and held under the provisions of any other agreement now existing between the parties, this agreement shall not be received or read in evidence before the arbitrators for any purpose whatsoever.

Seventh. This agreement and all its provisions shall be binding upon and enure to the benefit of the successors and assigns of each of the parties hereto.

In witness whereof, the said parties hereto have hereunto affixed their respective corporate seals, duly attested, the day and year first above written.

The Pennsylvania Railroad Company, by Geo. D. Dixon, Vice-President. Attest: Lewis Neilson, Secretary. Merchants' Warehouse Company, by Harvey C. Miller, President. Attest: S. Townsend Zook, Secretary.

(Signed, sealed and delivered in the presence of

AGREEMENT.

Pennsylvania Railroad Company and Merchants' Warehouse Company.

THIS AGREEMENT made this 28th day of July in the year of our Lord one thousand nine hundred and twenty-seven (A. D. 1927) between The Pennsylvania Railroad Company, hereinafter called the "Railroad Company", party of the first part, and the Merchants' Warehouse Company, a corporation organized and existing under the laws of the State of Pennsylvania, hereinafter called the "Warehouse Company", party of the second part;

Whereas, the parties hereto desire to enter into an agreement with respect to the handling and storage of flour, grain and other merchandise at the warehouse of the said Warehouse Company situated on the plot of land bounded by Delaware Avenue, Kenilworth Street, Penn Street and Bainbridge Street, in the City of Philadelphia, and State of Pennsylvania;

Now, therefore, this agreement witnesseth;

First. That the Railroad Company covenants and agrees:

(a) To maintain railroad tracks adjacent to the Warehouse Company's said warehouse, and to promptly do the necessary shifting to enable its cars to reach the warehouse aforesaid for the purpose of taking from and delivering to the same all freight to be shipped therefrom or destined thereto and shall and will take and deliver the same over its lines, at non-discriminatory rates, and in the same manner and with the same promptness that it delivers and receives like traffic at any other terminal point controlled by it in the City of Philadelphia.

(b) To pay to the said Warehouse Company for all services rendered by it in and about the receipt and delivery of freight for account of the Railroad Company, both incoming and outgoing, at the said warehouse the amounts following: Three and one-half cents (3½¢) per barrel for each barrel of flour up to fifty thousand (50,000) barrels per month; two and one-half cents (2½¢) per barrel for each barrel over the said fifty thousand (50,000) barrels per month; and thirty-five cents (35¢) per ton of two thousand (2,000) pounds for each ton of merchandise; except that no payment shall be made by the Railroad Company for freight which, upon arrival at its destination, is or has been unclaimed or refused by the consignee and has been stored by the Railroad Company with the Warehouse Company for account of the owners thereof, nor upon bulk freight, nor upon freight the movement of which by the Railroad Company has been performed at a switching rate, nor upon material or supplies belonging to the Railroad Company; provided, however, that the Railroad Company shall have the right to cancel or abrogate this agreement and/or the payment of allowances provided for in this paragraph in the event such action is authorized, permitted or required by any order, decision or law hereafter made, rendered or enacted by any State or Federal tribunal of competent jurisdiction, or in the event that these payments of allowances are held by any such tribunal to create undue preference or undue prejudice, upon such notice to the Warehouse Company in writing of its intention so to do as may be necessary to enable the Railroad Company to comply with such order, decision or law; and also provided that the Railorad Company shall have the right to cancel or abrogate at any time after sixty days' notice to the Warehouse Company in writing of its intention so to do the payments of allowances provided for in this paragraph, if it shall de-

cide to cancel similar payments of allowances now or hereafter in effect with respect to other warehouses in seaboard cities on its System.

Second. The Warehouse Company covenants and agrees:

(a) To at all times accord to traffic passing over the lines of the Pennsylvania Railroad Company's System, of which the railroads of the Railroad Company form part, preference in the facilities furnished by the Warehouse Company over traffic passing over other lines, it being understood that without the consent of the Railroad Company the said facilities shall not be extended to traffic passing over other lines.

(b) To promptly load, unload and handle all freight received by it to be shipped over the lines of the Railroad Company or received by it for delivery to consignees, and in the case of incoming freight to promptly notify the consignees of the arrival thereof.

(c) To be responsible to the Railroad Company for the prompt collection of all freight and other charges upon inbound freight, payment to be made by the Warehouse Company to the Railroad Company on the fifth day of each month of freight and other charges due on account of all freight delivered to it during the preceding month, excepting, however, any such charges which the Railroad Company may, from time to time, elect to collect direct from any consignee; and in order to secure the Railroad Company, the Warehouse Company shall furnish to it a bond with such good and sufficient sureties, and in such amount, as shall be approved by the Railroad Company, conditioned for the prompt payment of the said freight and other charges and for the performance

by the Warehouse Company of all its other covenants hereunder.

(d) To indemnify and hold harmless the Railroad Company for all damage to, or loss of, freight in the custody or control of the Warehouse Company, and all liability by reason thereof, and to keep an adequate and sufficient line of fire insurance on all such freight to cover the liability of the Railroad Company therefor.

(e) To promptly notify the Railroad Company in writing of the failure of any consignee to remove freight, and, so long as it holds the said freight for account of the Railroad Company, to observe and comply with all directions with respect to such freight which may be received by it from the Railroad Company.

(f) To protect and indemnify the Railroad Company from and against all manner of liability on account of any acts of omission or commission on the part of it, the said Warehouse Company, in respect to merchandise received by it at said warehouse, to be forwarded over the Railroad Company's lines or to be delivered to consignees, and also from and against all manner of liability on account of receipts for merchandise issued by it.

(g) To keep its said warehouse in good order and repair and properly equipped for the prompt and effective handling of the traffic delivered to and received by it.

Third. It is hereby mutually agreed that at the expiration of the period during which the Railroad Company shall currently allow freight to remain at its freight stations before delivery without charge to the

consignees, freight delivered by the Railroad Company to the Warehouse Company which has not been delivered to the consignee, or party entitled to receive the same, or which shall not by direction of said Railroad Company have been returned to the shipper thereof, or otherwise disposed of, shall be regarded and treated as stored with the Warehouse Company by the Railroad Company for account of the owners thereof, and thereupon the Warehouse Company shall be entitled to deal with the property and to make such charges for its custody as it may lawfully and properly do, and shall be further entitled to dispose of the same in such manner, and at such times, as it may lawfully and properly do for the purpose of realizing its charges thereon.

Fourth. It is further agreed that no assignment of this agreement shall be valid without the consent of the Railroad Company, and that this shall apply as well to involuntary assignments, and that upon the happening of any legal proceeding the effect of which shall be to divest the title or possession of the said Warehouse Company, this agreement shall, at the option of the Railroad Company, cease and determine; provided, however, that nothing contained in this Paragraph Fourth shall be construed to prevent the assignment of the income and revenues to the Merchants' Warehouse Company from this agreement as additional security for mortgage bonds to be issued by the said Warehouse Company.

Fifth. This agreement shall take effect as of the first day of September, A. D. 1927, and shall continue in full force and effect until the first day of February, A. D. 1937; provided, however, that should the Warehouse Company in any respect violate or fail to comply with any of the conditions and covenants

herein contained, then this agreement shall, at the option of the Railroad Company, on thirty (30) days' written notice to the Warehouse Company, cease and determine and become absolutely void.

Sixth. This agreement shall be construed to be applicable only to the warehouse situated on the plot of land bounded by Delaware Avenue, Kenilworth Street, Penn Street and Bainbridge Street, as aforesaid, and in no wise or manner as impairing or affecting the terms and conditions of any other contract between the parties hereto in connection with any other premises. In the event of any arbitration being demanded and held under the provisions of any other agreement now existing between the parties, this agreement shall not be received or read in evidence before the arbitrators for any purpose whatsoever.

Seventh. This agreement and all its provisions shall be binding upon and enure to the benefit of the successors and assigns of each of the parties hereto.

In witness whereof, the said parties hereto have hereunto affixed their respective corporate seals, duly attested, the day and year first above written.

The Pennsylvania Railroad Company, by (Name illegible), Vice-President. Attest: Lewis Neilson, Secretary. Merchants' Warehouse Company, by Harvey C. Miller, President. Attest: S. Townsend Zook, Secretary.

Signed, sealed and delivered in the presence of (names illegible).

AFFIDAVIT OF DEFENSE IN THE NATURE OF A DEMURRER OF THE PENNSYLVANIA RAILROAD COMPANY TO PLAINTIFF'S STATEMENT OF CLAIM.

(Filed May 2, 1932.)

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

JULIEN L. EYSMANS, being duly sworn according to law, deposes and says that he is vice-president of The Pennsylvania Railroad Company, one of the above-named defendants, and is authorized to make and makes this affidavit on its behalf; and that the statement of claim filed in the above-entitled case is not sufficient in law, for the following reasons:

1. The Court has no jurisdiction upon the facts as set out in the statement of claim under the Acts of Congress of July 2, 1890, c. 647, sec. 1 and 2, and October 15, 1914, c. 323, sec. 4.

2. The averments of fact set forth in plaintiff's statement of its cause of action do not constitute a cause of action under the provisions of the Acts of Congress mentioned in the first paragraph hereof.

3. The provisions of the agreements referred to in paragraph 9 of the said statement of claim and made part thereof, do not violate the Acts of Congress mentioned in the defendant's first objection.

4. The averments of damage alleged to have been suffered by plaintiff, as set forth in the statement of claim, are vague, indefinite and speculative, and plaintiff is not entitled to recover damages under such averments.

Defendant, therefore, respectfully requests the Court to hear and dispose of the questions of law so raised, in accordance with the provisions of section 20 of the Practice Act of 1915.

JULIEN L. EYSMANS.

Sworn to and subscribed before me this twenty-ninth day of April, 1932.

N. SPERING,
(Seal) *Notary Public.*
My commission expires April 1, 1935.

OPINION

Sur Statutory Demurrer.

(Filed November 2, 1932.)

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

TRESPASS.

No. 16,722. March Sessions, 1932.

Walter A. Bailey, Trading as Bailey Warehouses

v.

Pennsylvania Railroad Company and Merchants Warehouse Company.

DICKINSON, *J.*

There are two of these cases, alike in the questions of law raised. The plaintiffs together seek to recover the rather tidy sum of $6,000,000.00. If they are tried, it will be at the cost of much time, labor and expense. The questions of law raised go to the cause of action asserted and hence "to the whole of the claim" made. Counsel in consequence join in the expression of the hope that it may be found that the fact and law merits of the cause may be brought before the Court by the Pleadings, so that the judgment to be rendered may be reached without the necessity of a protracted trial.

The parties are represented by experienced counsel who have made an exhaustive investigation and present a complete analysis of the respective contentions made. We accordingly, knowing the opposing interests to be in competent hands, feel that we can safely follow the analysis thus made, and accept the

questions discussed as the questions which arise in the case.

In order to get the point of view of the defendants, it is helpful to premise that the Railroad defendant is a common carrier engaged in interstate and intrastate commerce. Philadelphia is a city on its line. There is an advantage to consignors and consignees in availing themselves of the lower tariff rates given to shippers in car-load lots, and hence the practice grew up for those who would otherwise be consignees of less than car-load lots to join together in getting a car-load shipment. This made it necessary, or at least convenient, for them to choose one consignee to whom, or in whose care, the car load shipments could be made, and helpful further to have this consignee distribute the contents of the cars to the several real owners. There was the like necessity or advantage in making shipments. The shipments to and from Philadelphia were some to points within the State and some to points outside. There was need that this representative receiver and sender of shipments should be trained and equipped for the service he was to render. In response to this need and consequent demand, what are called warehousemen came into existence. The appellation is itself descriptive of the work they did. The plaintiff is one such warehouseman and the co-defendant is another. The further practice years ago grew up for the different railroads each to select a warehouseman to render the service indicated. For it the warehouseman chosen was compensated by the railroad, and substantial sums of money were received by the co-defendant for the services thus rendered by it. The co-defendant was made, or made to figure as, an employee of the railroad, and its warehouse was made or called a freight station of the railroad. Incidentally, for whatever it may be

worth, the averment is made that the railroad was part owner of the co-defendant warehouse and received a share in its profits. However, at the time this was done and for years afterwards there was not thought to be and there was not any illegality in it. What was done was openly done and avowed and was made the subject of a written agreement. When it is recalled that the plaintiff and the co-defendant, as well as others, were competitors in the same field of business endeavor, it would be idle to deny that the arrangement thus made greatly favored the chosen warehouseman and put its competitors to a great disadvantage. Whatever wrongs the outsider warehousemen felt, there was no legal wrong done them and they were obliged to submit and accept the situation as thus created. Then came the Act of Congress creating the Interstate Commerce Commission, to which the complaining warehousemen finally went with their complaint. The Commission, after a full and lengthy inquiry, ruled in favor of the complainants, and the defendants (the co-defendant here having been permitted to intervene) were ordered to desist from the practice above outlined.

Gallagher v. R. R., 160 I. C. C. 563.

The defendants brought this order before the Statutory Court, which was convened for the purpose, for review, and the Commission was by that Court sustained and upheld in what it had done.

Merchants v. U. S., 44 (2d) Fed. Rep. 379.

On appeal to the Supreme Court the rulings made by the Commission and by the Statutory Court were affirmed.

Same v. Same, 283 U. S. 501.

This recital will enable us to appreciate the questions of law raised by this Statutory Demurrer. They are:

1. The remedy to which the plaintiff has a right is that afforded by the Interstate Commerce Act. This is exclusive and has been exhausted by the plaintiff, hence no right of action is given by the Sherman Act under which the plaintiff is now claiming, nor does any cause of action arise thereunder.

2. The business charged to have been in part monopolized and restrained is not commerce within the meaning of the Commerce clause of the Constitution, nor is it interstate.

3. The railroad defendant and the warehouse defendant are not competitors nor have they competed, so that no agreement nor arrangement between them could nor did restrict competition.

4. Interstate commerce is not directly affected by the agreement between the railroad defendant and the warehouse defendant nor by anything done thereunder, and in consequence no cause of action arises under the Sherman Act.

DISCUSSION

In discussing these questions, we shall depart from the order in which listed, and to some of them give only a more or less perfunctory consideration. It is unnecessary to premise that we are dealing not with trial questions but with questions of pleading; with what is averred not with the truth of the averments. The statement of claim avers (1) that the plaintiff is engaged in commerce, and (2) that this commerce is in part interstate, but these general averments are qualified by statements of what the plaintiff does, for

it likewise avers what it is in which the plaintiff is engaged, and hence the questions do arise (1) whether this is commerce, and (2) whether it is interstate. What the plaintiff did was to receive interstate shipments carried by the railroad, either consigned to him or in his care, for the patrons of his warehouse, and to receive from the latter shipments to be made in interstate commerce. It is true he did not have title to the shipment but the commercial character of the shipment does not turn upon the ownership of what was shipped. Commerce is business intercourse. If it takes the form of transportation its commercial character is independent of what is shipped or who owns it.

Gibbons v. Ogden, 22 U. S., 1.

We are of opinion that the plaintiff was engaged in commerce and in interstate commerce. We see a well defined difference between the Commerce Act and the Sherman Act. They have different objectives. The former is aimed at control of the carriers to the end that they may not exact excessive rate charges; the latter is aimed at those who would restrain or monopolize commerce. It is true that the forbidden thing in the former may, and we assume always would, tend to interrupt or diminish the flow of commerce, although it is conceivable that it might not. The forbidden thing in the latter is the restraint or monopoly of commerce. It might well be that the trade of A. could be destroyed through a conspiracy which used as one of its instrumentalities the imposition of killing tariff transportation rates upon B. The distinction between the two injuries is no less real if A. and B. were the same person. If they were, we see no legal obstacle in either Act to A. appealing to the Commission to stop the illegal exaction under the one Act and to appeal to the Courts to award him damages under the

other. In moving to this conclusion, we do not encounter

Keogh v. Rway, 260 U. S., 156.

In that case the question was not of commerce but of rates. The charge was that a number of carriers had conspired to exact undue tariff rates. An appeal was made to the Commission with the result that the rates were held to be reasonable and lawful. An appeal was then made to the Courts under the Sherman Act but there was no complaint other than a conspiracy to exact an excessive tariff charge. It was held that the plaintiff had no cause of action and that the Sherman Act gave no right of action, the sole remedy for an excessive tariff rate injury being given by the Commerce Act.

Here the injury complained of is not the exaction of an undue transportation rate but an injury to plaintiff's trade. The charge has no reference to the tariff rate other than that this was used as one of the instrumentalities by which injury to trade was done.

The argument addressed to us assumes the plaintiff to have no complaint (as in the Keogh case) except of an excessive tariff charge. This is not only not the only complaint but it is not the complaint at all.

The conclusion reached is that the plaintiff may resort to the Sherman Act for redress of the injury to his trade.

The further point made that the carrier and its favored warehousemen are not competitors is a fact, but we cannot accept the application made of it beyond its possible trial use to acquit the carrier of participation in a conspiracy to monopolize a trade in which it had no interest. The plaintiff and the warehouse defendant are however competitors, and if the carrier, although without interest, joined in the conspir-

acy charged, it would be answerable. Moreover, the further complaint is that it is interested.

The remaining points made we find no need to pass upon at this time. It may or may not be true that the contracts do not in themselves "constitute a restraint or monopoly of the warehousing business". The charge, as several times said, is the wholly different one of a conspiracy to monopolize with the contracts averred to be among the means used to achieve the plotted result. What the fact may be is a trial question. So likewise the defensive proposition, that the plaintiff having appealed to the Commission has lost his right of appeal to the Courts. The answer is a reiteration. The basis of the action is a conspiracy to give one of the defendants a monopoly of the warehousing business to aid in accomplishing which the other defendant made unlawful use of its rate making powers. This unlawful use was stopped by the Commission, but it does not follow that the plaintiff is thereby shut out from seeking the remedy given by the Sherman Act.

We are of opinion that the questions of law raised should be ruled in favor of the plaintiff, with leave to defendants to file an affidavit of defense to the fact averments of the statement of claim, in accordance with the Pennsylvania Practice Act of 1915 &c.

An appropriate order may be submitted, and a like order entered in No. 16,774, March Sessions 1932.

ORDER OVERRULING STATUTORY DEMURRERS.

(Filed November 10, 1932.)

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 16,774. March Term, 1932.

Terminal Warehouse Company, a Corporation,

v.

Pennsylvania Railroad Company, a Corporation, and Merchants Warehouse Company, a Corporation.

AND NOW, November 10, 1932, the affidavit of defense in the nature of a demurrer of the Pennsylvania Railroad Company, defendant, and the statutory demurrer of Merchants Warehouse Company, defendant, are hereby overruled with leave to the said defendants to file affidavits of defense to the merits within fifteen days from the date hereof.

By THE COURT,

DICKINSON, *J.*

DEFENDANT, PENNSYLVANIA RAILROAD COMPANY'S EXCEPTION TO ORDER OVERRULING STATUTORY DEMURRER.

(Filed May 29, 1934.)

And Now, May 28, 1934, comes the defendant, The Pennsylvania Railroad Company and asks that the Court grant it an exception to the order entered November 10, 1932, overruling the affidavit of defense in the nature of a demurrer of The Pennsylvania Railroad Company.

THE PENNSYLVANIA RAILROAD COMPANY

By Its Attorney,

(Sgd.) John Hampton Barnes.

ORDER.

(Filed May 29, 1934.)

And Now, May 29, 1934, an exception is granted to defendant, The Pennsylvania Railroad Company, nunc pro tunc, to the order entered November 10, 1932, overruling the affidavit of defense in the nature of a demurrer of The Pennsylvania Railroad Company.

(Sgd.) O. B. Dickinson, *J.*

DEFENDANT, MERCHANTS WAREHOUSE COMPANY'S EXCEPTION TO ORDER OVERRULING STATUTORY DEMURRER.

(Filed May 29, 1934.)

And Now, May 28, 1934, comes the defendant, Merchants Warehouse Company, and asks that the Court grant it an exception to the order entered November 10, 1932, overruling the affidavit of defense in the nature of a demurrer of Merchants Warehouse Company.

MERCHANTS WAREHOUSE COMPANY

By Its Attorney,

Robert T. McCracken.

ORDER.

(Filed May 29, 1934.)

And Now, May 29, 1934, an exception is granted to defendant, Merchants Warehouse Company, nunc pro tunc, to the order entered November 10, 1932, overruling the affidavit of defense in the nature of a demurrer of Merchants Warehouse Company.

(Sgd.) Dickinson, *J.*

AFFIDAVIT OF DEFENSE OF PENNSYLVANIA RAILROAD COMPANY.

(Filed December 2, 1932.)

COMMONWEALTH OF PENNSYLVANIA,
CITY AND COUNTY OF PHILADELPHIA, } *ss.:*

JOHN B. LARGE, being duly sworn according to law, deposes and says that he is assistant general traffic manager of The Pennsylvania Railroad Company, one of the above-named defendants, hereinafter referred to as "Railroad Company," and is authorized to make and makes this affidavit on its behalf; and that the Railroad Company has a full, just, true and legal defense to the whole of plaintiff's claim, of the following nature and character, to wit:

1. Admitted.

2. Admitted.

3. Admitted.

4. Denied in part. Railroad Company admits that plaintiff, during the past six years and longer, has been engaged in carrying on a general warehousing business in the City of Philadelphia, Pennsylvania, but Railroad Company has no knowledge whether or not plaintiff receives for storage, performance of other warehouse services and/or distribution, either within or outside of Pennsylvania, goods shipped over the lines of Railroad Company and other carriers, or receivers from shippers and patrons in Philadelphia goods to be handled and forwarded and/or handled, stored and subsequently forwarded over the lines of Railroad Company and other carriers, because the means of proof of these alleged facts are under the exclusive control of plaintiff. Railroad Company, therefore, denies

the said allegations and demands proof of the facts so alleged by plaintiff.

5. Railroad Company admits that Merchants Warehouse Company, hereinafter referred to as "Merchants Company," during the past six years and longer, has been engaged in carrying on a general warehousing business in the City of Philadelphia, Pennsylvania, but Railroad Company has no knowledge, and after reasonable investigation is unable to ascertain whether the said business of Merchants Company is similar to that described in paragraph 4 of the statement of claim. Railroad Company, therefore, denies said allegations and demands proof thereof by plaintiff.

6. Railroad Company has no knowledge, and after reasonable investigation is unable to ascertain whether plaintiff and Merchants Company have during the past six years or longer been actively competing with each other or with other warehouse companies for the warehousing business in the City of Philadelphia, Pennsylvania, or whether each has actively solicited business largely from customers outside the State of Pennsylvania. Railroad Company, therefore, denies said allegations and demands proof thereof by plaintiff.

7. Railroad Company admits that it owns 1,245 shares of stock of Merchants Company. The total number of shares issued and outstanding of Merchants Company is 6,942 shares.

8. Railroad Company denies that the business of Merchants Company is commerce between the states or intrastate commerce, and that in violation of the Act of Congress of June 2, 1890, c. 647, sections 1 and 2; 26 Stat. 209; 15 U. S. C., sections 1 and 2, it, Railroad Company, and Merchants Company, for the past

six years or longer, or at any time, have combined or conspired to monopolize or restrain trade and commerce among the several states, either by combining or conspiring to render unprofitable or destroy the business of plaintiff or other competing warehouse companies in the City of Philadelphia, or to gain for Merchants Company a monopoly of the warehousing business in said city, or for Railroad Company a monopoly of transportation services, or a further benefit in the increased dividends or value of the stock of Merchants Company, or by means of any of the acts alleged in paragraphs 9 to 19, inclusive, of the statement of claim, or by any means whatever. The foregoing denial of the whole of paragraph 8 of the statement of claim is hereby made a part of the answer of Railroad Company to each of paragraphs 9 to 19, inclusive, of the statement of claim with reference to the particular averments therein, with the same effect as if the answer of Railroad Company to each of said paragraphs contained a specific denial, as herein set forth, that the acts or agreements of Railroad Company and Merchants Company herein respectively alleged were entered into, transacted or carried out in furtherance or as a result of any combination or conspiracy alleged in paragraph 8 of the statement of claim, or of any contract, combination or conspiracy to monopolize or restrain interstate commerce, whatever.

9. Railroad Company admits that it entered into the contracts with Merchants Company referred to in paragraph 9 of the statement of claim, copies of some of which, being those specifically referred to in plaintiff's statement of claim, are attached thereto by stipulation of counsel dated April 25, 1932, and filed of record, and that the said contracts were carried out by both parties thereto until May, 1931, when the Supreme Court of the United States declared them to be in viola-

tion of the Act to Regulate Commerce of February 4, 1887, c. 104; 24 Stat. 379; February 28, 1920, c. 91; 41 Stat. 479, in the case of Merchants Warehouse Company v. United States, 283 U. S. 501. Railroad Company avers the payments made under said contracts were for actual services rendered.

10. Railroad Company denies that since 1912, or at any time, it has in its published tariffs undertaken, as a part of the transportation service covered by its tariffs, to load or unload package freight without charge at warehouses of Merchants Company, or that it has in fact done so at any time; and that it has at any time transported interstate traffic of Merchants Company at rates or charges lower than rates or charges exacted by Railroad Company for similar transportation of plaintiff's interstate traffic performed contemporaneously.

11. Railroad Company denies the conclusion of law embodied in paragraph 11 of the statement of claim, except that it admits that the Supreme Court of the United States made the decision described in paragraph 9 hereof.

12. Admitted, except as denied in paragraph 8 hereof.

13. Railroad Company has no knowledge, and after reasonable investigation is unable to ascertain whether or not Merchants Company used the payments obtained from Railroad Company, as set forth in paragraphs 9 and 10 of the statement of claim, at least in part, to subsidize its warehousing business and to stimulate and promote its trade. Railroad Company, therefore, denies said allegation and demands proof thereof by plaintiff.

14. Denied. Railroad Company denies that it has, during the past six years or longer, or at any time,

granted to Merchants Company unlimited storage on its tracks at Philadelphia of freight in cars, exempt from demurrage or other charges for detention made to plaintiff or other warehouses.

*Prior to June 1, 1931, no demurrage or other charges for detention of cars were made by Railroad Company against Merchants Company. On the contrary, it was the understanding of both said companies, prior to the decision of the Supreme Court referred to in paragraphs 9, 10 and 11 of plaintiff's statement of claim, that Merchants Company was the agent of Railroad Company for the receipt and delivery of freight, and that the warehouses of Merchants Company were freight stations of Railroad Company, and that no demurrage or other charges for the detention of cars were chargeable against Merchants Company. Railroad Company avers that after June 1, 1931, all demurrage charges provided in Railroad's tariff were duly charged against and collected from Merchants Company, and that said charges were the same as the demurrage charges made against and collected from plaintiff and other competing warehouses.

15. Railroad Company admits that it constructed and maintained sidetracks to the warehouses of Merchants Company, but denies that it did so without imposing any obligation upon Merchants Company in return therefor. On the contrary, Railroad Company avers that said construction and maintenance was part of the consideration given by it in return for the services of the Merchants Company in the receipt and delivery of freight, and was included as an agreement on the part of Railroad Company in the said contracts, referred to in paragraph 9 of the statement of claim, to

*See stipulation of counsel dated October 18, 1933, attached hereto.

the terms of which reference is made in respect to this answer.

16 Railroad Company admits that by the four agreements dated July 1, 1916, copies of which are attached to the statement of claim, Merchants Company agreed to use all reasonable efforts to secure to the lines of Railroad Company all traffic controlled by it. Railroad Company has no knowledge and after reasonable investigation is unable to ascertain whether Merchants Company has routed substantially all such traffic over the lines of Railroad Company. Railroad Company, therefore, denies the said allegation, and demands proof thereof by plaintiff.

17. Railroad Company admits that it has during the past six years and longer printed statements in its filed and published tariffs to the effect that the warehouses of Merchants Company were public freight stations of Railroad Company, but denies any purpose unduly to influence shippers and patrons to route the warehouse freight traffic through Merchants Company. Railroad Company admits that it has held Merchants Company forth as its agent and allowed Merchants Company to assert that it was Railroad Company's agent, but denies any purpose unduly to influence shippers or patrons to route the warehouse freight traffic through Merchants Company. Railroad Company admits that for the purpose of obtaining traffic over its lines of railroad it did by publication call to the attention of shippers the facilities for storage and handling and services incidental to warehousing, afforded by Merchants Company and sundry other warehouse companies

18. As set forth above, Railroad Company denies the free storage, denies the free sidetracks, denies the unduly preferential diversion of warehouse traffic by

Railroad Company through warehouses operated by Merchants Company, admits the payments to be made under the contracts were subsequently declared by the Supreme Court to be in violation of the said Act to Regulate Commerce, of February 4, 1887. Railroad Company has no knowledge, and after reasonable investigation is unable to ascertain whether Merchants Company was enabled to or did charge less than the fair, just and normal value for its services to shippers, or loaded or unloaded package freight without charge, or allowed shippers forty-eight hours free storage in its warehouses, or whether Merchants Company widely advertised such alleged charges, free handling or free storage in the State of Pennsylvania, or in other states, or specifically called the same to the attention of any of plaintiff's customers, largely outside of the State of Pennsylvania. Railroad Company, therefore, denies the said allegations and demands proof thereof by plaintiff. Railroad Company denies that it advertised such alleged charges, free handling or free storage either in the State of Pennsylvania or elsewhere, or specifically called the same to the attention of any of plaintiff's customers. Railroad Company has no knowledge, and after reasonable investigation is unable to ascertain whether Merchants Company secured, now has, or ever had more than its just, fair and normal portion of all or any part of the warehousing business in Philadelphia, Pennsylvania, or such a large percentage of said business in any of the heavier or other commodities, including among them flour, newsprint paper, canned goods and sugar, as to constitute a monopoly or a tendency to monopoly of said part, or any part of the warehousing business, in violation of the Act of Congress of July 2, 1890, c. 647, section 2; 26 Stat. 209; 15 U. S. C., section 2. Railroad Company, therefore, denies the said allegations and demands proof thereof by plaintiff. Railroad Company denies

that it secured, now has, or ever had, more than its just, fair and normal portion of all or any part of the transportation business or such a large percentage of said business in any of the heavier or other commodities, including among them flour, newsprint paper, canned goods and sugar, as to constitute a monopoly or a tendency to monopoly of said part or any part of the transportation business, in violation of the said Act of Congress. Railroad Company further denies that it or Merchants Company secured, now has, or at anytime had the said alleged monopolies of the warehousing or transportation business as the result of any of the acts alleged in paragraph 18 of the statement of claim, or as the result of any contract, combination or conspiracy between them whatever, in violation of the said Act of Congress. Railroad Company expressly avers that neither the acts alleged to have been done by it and by Merchants Company, nor the payments stated to be illegal rebates create or constitute any basis of action, right of action or jurisdiction under the said act.

19: Railroad Company admits that during the past six years and longer, plaintiff operated the warehouses in Philadelphia referred to in paragraph 19 of the statement of claim, but denies that said warehouses are as well located as those of Merchants Company. Railroad Company has no knowledge, and after reasonable investigation is unable to ascertain whether the said warehouses are as well managed or equipped as those of Merchants Company. Railroad Company has no knowledge whether or not plaintiff has at all times been able and willing to handle and has made every reasonable effort to gain and retain its fair, just and normal share of the warehousing business in Philadelphia, because the means of proof of the facts so alleged are under the exclusive control of plaintiff.

Railroad Company, therefore, denies said allegations and demands proof thereof by plaintiff. Railroad Company denies the existence now or at any time of any combination or conspiracy between it and Merchants Company such as the alleged combination and conspiracy complained of, or any combination or conspiracy whatever. As set forth above, Railroad Company denies the low prices, free storage and free handling alleged in paragraphs 17 and 18 of the statement of claim, and the alleged practices thereunder, and denies that plaintiff was prevented from obtaining its fair, just or normal share of the warehousing business in Philadelphia. Railroad Company further denies that it enticed any of plaintiff's customers away from it. Railroad Company has no knowledge, and after reasonable investigation is unable to ascertain whether any of plaintiff's customers were enticed away from it by Merchants Company, and therefore denies the said allegation, and demands proof thereof by plaintiff. Railroad Company denies that plaintiff's business has been curtailed below its fair, just and normal volume, or that it has lost the profits it would have made therefrom; that plaintiff has been forced to reduce, or that it has reduced its charges below their fair, just and normal amount; or that plaintiff's profits have been reduced $1,500,000, or that they have been reduced in any amount by any of the alleged acts or agreements of Railroad Company and Merchants Company, or by any acts or transactions of Railroad Company and/or Merchants Company whatever.

20. Railroad Company denies that it and Merchants Company are liable to plaintiff in the sum of $4,500,000, and costs, including a reasonable attorney's fee, or in any amount.

21. In a proceeding before the Interstate Commerce Commission, Docket No. 20968, plaintiff has al-

ready sought to recover damages from Railroad Company for the same alleged injury to its business, for which it is seeking to recover damages in the present action. In an order entered December 28, 1929, in the said proceeding, and reported in 160 I. C. C. 563, Division 3 of the Interstate Commerce Commission held that plaintiff was not entitled to damages. Thereafter in a petition dated February 24, 1930, in the same proceeding, plaintiff asked for reconsideration of the conclusions of Division 3, in respect of reparation, by the entire Commission, and for a further hearing. The said petition was denied by the Interstate Commerce Commission, at a general session thereof, by an order dated June 1, 1931. In a subsequent proceeding before the Interstate Commerce Commission, begun August 23, 1930, Docket No. 23790, plaintiff sought to recover damages for the same alleged injury to his business, for the period following that covered by the said prior proceeding. The Interstate Commerce Commission dismissed the complaint in the said subsequent proceeding, by an order dated May 9, 1932. The right of plaintiff to recover damages from Railroad Company for the said alleged injury to its business is, therefore, *res judicata.*

JOHN B. LARGE.

Sworn to and subscribed before me this second day of December, A. D. 1932.

J. E. WILLIAMS,
(Seal) *Notary Public.*
My commission expires March 9, 1935.

STIPULATION OF COUNSEL AMENDING PARAGRAPH 14 OF THE AFFIDAVIT OF DEFENSE OF PENNSYLVANIA RAILROAD COMPANY.

(Filed October 2, 1933.)

And Now, October 18, 1933, it is stipulated and agreed between counsel for the plaintiff and counsel for the defendant, Pennsylvania Railroad Company, that paragraph 14 of the affidavit of defense of Pennsylvania Railroad Company be and it is hereby amended by adding thereto the following, with the same force and effect as if it had originally been so stated in said affidavit of defense:

> Prior to June 1, 1931, no demurrage or other charges for detention of cars were made by Railroad Company against Merchants Company. On the contrary, it was the understanding of both said companies, prior to the decision of the Supreme Court referred to in paragraphs 9, 10 and 11 of plaintiff's statement of claim, that Merchants Company was the agent of Railroad Company for the receipt and delivery of freight, and that the warehouses of Merchants Company were freight stations of Railroad Company, and that no demurrage or other charges for the detention of cars were chargeable against Merchants Company. Railroad Company avers that after June 1, 1931, all demurrage charges provided in Railroad's tariff were duly charged against and collected from Merchants Company, and that said charges were the same as the demurrage charges made against and collected from plaintiff and other competing warehouses.

T. R. White,
Counsel for Terminal Warehouse Company.
John Hampton Barnes,
Counsel for Pennsylvania Railroad Company.

AFFIDAVIT OF DEFENSE OF MERCHANTS WAREHOUSE COMPANY.

(Filed November 23, 1932.)

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

GEORGE M. RICHARDSON being duly sworn doth depose and say:

1. I am treasurer and general manager of the Merchants Warehouse Company, one of the defendants in the above-entitled cause and make this affidavit of defense on its behalf.

2. I deny each and all of the averments in the plaintiff's statement of its cause of action wherein it avers that the defendants entered into a conspiracy to restrain interstate commerce and to monopolize trade among the states.

3. I am advised by counsel, verily believe and therefore aver that this being an action of trespass to recover damages for an alleged tort, the defendant is not required to further answer the averments contained in the plaintiff's statement of its cause of action.

And further deponent saith not.

(Sgd.) GEORGE M. RICHARDSON.

Subscribed and sworn to before me this twenty-second day of November, A. D. 1932.

(Sgd.) ROBERT G. ERSKINE.
(Seal) *Notary Public.*
Commission expires February 9, 1933.

MOTION UNDER 28 U. S. C., § 636 TO REQUIRE PRODUCTION OF WRITINGS ON THE TRIAL.

(Filed June 30, 1933.)

And Now, June 30, 1933, comes Terminal Warehouse Company, plaintiff in the above-entitled cause, and moves this Court for an order requiring Pennsylvania Railroad Company, one of the defendants in the above-entitled cause, to produce on the trial of the said cause, the books and writings hereinafter enumerated, which are in its possession or control, containing evidence pertinent and material to the issues in said cause as hereinafter stated, and tending to support the contentions of Terminal Warehouse Company, plaintiff herein, pursuant to 28 U. S. C. § 636 (R. S. § 724).

The books and papers herein sought to be produced are the following:

1. All bills and claims filed with Pennsylvania Railroad Company by Merchants Warehouse Company of Philadelphia, Pennsylvania, for each month of the period from March 1, 1926, to April 30, 1931, inclusive, for allowances specified in Pennsylvania Railroad Company's Tariff G. O. I. C. C., No. 14400, and/or under certain contracts dated July 1, 1916 (4 contracts), January 25, 1917, July 3, 1918, April 10, 1922, March 4, 1925, and July 28, 1927, for handling freight through warehouses of Merchants Warehouse Company at Philadelphia, Pennsylvania, which was transported by the Pennsylvania Railroad Company, together with all vouchers, drafts and checks evincing payment of said bills and claims. The information contained in these bills and claims is pertinent to the issues as showing the fact and amount of payments made by Pennsylvania Railroad Company to Merchants Warehouse Company, which it is alleged were

illegal rebates made pursuant to and as one of the essential elements in the alleged conspiracy in violation of the Act of Congress of July 2, 1890, C647, §§ 1, 2; 26 Stat. 209; 15 U. S. C., §§ 1, 2.

2. All demurrage records showing the date and time of arrival of all loaded cars moved inbound via the Pennsylvania Railroad Company to warehouses of Merchants Warehouse Company in the City of Philadelphia, the date and time of placement of said cars at said warehouses for unloading, the date and time said cars were released by said Merchants Warehouse Company and the amount of demurrage which Pennsylvania Railroad Company charged and collected from the Merchants Warehouse Company for the detention of said cars throughout the period from March 1, 1926, to March 12, 1932, inclusive. The information contained in these demurrage records is pertinent to the issues as showing that Pennsylvania Railroad Company granted Merchants Warehouse Company the right to unlimited storage on its tracks at Philadelphia of freight in cars exempt from demurrage and other charges for detention made to Terminal Warehouse Company, plaintiff, and other competing warehouses, which grant, it is alleged, was made pursuant to and as one of the essential elements of the conspiracy above referred to, which is the basis of plaintiff's action.

WHEREFORE, plaintiff prays that an order be made herein directed against Pennsylvania Railroad Company, one of the defendants in the above-entitled cause, requiring and compelling said Pennsylvania Railroad Company to produce, or cause to be produced, at the beginning of the trial of the said cause, for inspection and use of the plaintiff on said trial, the said writings above enumerated.

(Sgd.) T. R. WHITE,
Attorney for Terminal Warehouse Co.

I, T. R. WHITE, do hereby certify that I am one of the attorneys for the Terminal Warehouse Company in the above-entitled cause; that I am familiar with the complaint and answer in this cause, and that I therefore certify that in my opinion the matters and things called for in the above and foregoing motion are relevant and pertinent and material to the trial of this cause.

(Sgd.) T. R. WHITE,
Attorney for Terminal Warehouse Company.

Date: June 30, 1933.

AFFIDAVIT IN SUPPORT OF MOTION.

(Filed June 30, 1933.)

JOHN J. HICKEY, being first duly sworn according to law, deposes and says:

1. I am one of the attorneys for the plaintiff in the above-entitled cause.

2. I am familiar with the proceedings and the facts in said cause which is brought to recover damages suffered by plaintiff due to a combination and conspiracy between defendants therein to monopolize and restrain trade and commerce among the several states in violation of the Act of Congress of July 2, 1890, c. 647, Secs. 1, 2; 26 Stat. 209; 15 U. S. C. Secs. 1, 2.

3. On information and belief, Pennsylvania Railroad Company, one of the defendants herein, has in its possession and under its control bills and claims filed with it by Merchants Warehouse Company of Philadelphia, Pennsylvania, for each month of the period from March 1, 1926, to April 30, 1931, inclusive, for allowances specified in Pennsylvania Railroad

Company's Tariff G. O. I. C. C. No. 14,400, and/or under certain contracts dated July 1, 1916 (four contracts), January 25, 1917, July 3, 1918, April 10, 1922, March 4, 1925, and July 28, 1927, for handling freight through warehouses of Merchants Warehouse Company, at Philadelphia, Pennsylvania, which was transported by the Pennsylvania Railroad Company, together with all vouchers, drafts and checks evincing payment of said bills and claims, and demurrage records showing the date and time of arrival of all loaded cars moved inbound via the Pennsylvania Railroad Company to warehouses of Merchants Warehouse Company in the City of Philadelphia, the date and time of placement of said cars at said warehouses for unloading, the date and time said cars were released by said Merchants Warehouse Company and the amount of demurrage which Pennsylvania Railroad Company charged and collected from the Merchants Warehouse Company for the detention of said cars throughout the period from March 1, 1926, to March 12, 1932, inclusive. The source of the information and the grounds of belief are as follows:

(a) The defendant, Pennsylvania Railroad Company, is required by Section 20 of the Interstate Commerce Act and the accounting regulations promulgated by the Interstate Commerce Commission pursuant to that section of the statute to make and keep the aforesaid records.

(b) Section 6 of the Interstate Commerce Act and certain tariffs filed and published by the defendant, Pennsylvania Railroad Company, pursuant to that section of the statute, compel the defendant, Pennsylvania Railroad Company, to make and keep the aforesaid records of detention of cars and demurrage; said tariffs are here identified as follows: Tariffs of Agent

B. T. Jones, I. C. C. Nos. 1581, 1737, 1855, 2003, 2150, 2192 and 2313.

(c) The defendant, Pennsylvania Railroad Company, at a public hearing before the Interstate Commerce Commission, in Docket No. 20968, in the City of Washington in the District of Columbia, on July 30, 1928, produced and exhibited the aforesaid bills and claims filed with it by Merchants Warehouse Company of Philadelphia, Pennsylvania, for each month of the period from May 1, 1926, to June 1, 1928, inclusive, and also vouchers, drafts and checks evincing payment of said bills and claims.

4. All of said writings are material to and pertinent to the issues in said cause, to prove plaintiff's contention that the defendants therein had combined and conspired to monopolize and restrain trade and commerce in the several states in violation of the Act of Congress above referred to, and that said combination and conspiracy was carried out by a series of acts among which were the granting by Pennsylvania Railroad Company to Merchants Warehouse Company of illegal rebates under the guise of compensation for handling services performed by the latter, and the granting by Pennsylvania Railroad Company to Merchants Warehouse Company of unlimited storage on its tracks at Philadelphia for freight in cars exempt from demurrage and other charges for detention made to plaintiff and other competing warehouses.

5. An inspection of said writing is necessary to enable plaintiff to prove its cause of action.

6. Said evidence cannot be obtained from any other source known to affiant.

JOHN J. HICKEY.

Sworn to and subscribed before me this twenty-third day of June, 1933.

ELIZABETH G. SAUTTER,
(Seal) *Indicating Miss Sautter is a Notary Public and That Her Commission Expires March 16, 1937.*

ANSWER OF PENNSYLVANIA RAILROAD COMPANY TO MOTION UNDER 28 U. S. C. § 636, TO REQUIRE PRODUCTION OF WRITINGS ON THE TRIAL.

(Filed August 22, 1933.)

AND Now, August 21, 1933, the Pennsylvania Railroad Company, one of the above-named defendants, files this its answer to plaintiff's motion under 28 U. S. C. sec. 636, to require production of writings on the trial:

1. Pennsylvania Railroad Company cannot be compelled, upon the motion made by plaintiff under 28 U. S. C. sec. 636 (R. S. 724) to produce the books, papers, records and writings referred to in the said motion, nor any books, papers, records or writings whatever, since the above-entitled action has been brought by plaintiff to recover treble damages under the Act of October 15, 1914, c. 323, sec. 4 (38 Stat. 731; 15 U. S. C. sec. 15) as averred in paragraph 20 of plaintiff's statement of claim and is, therefore, an action for a penalty.

2. The provisions of the Constitution of the United States, and particularly the provisions of Amendment V thereof, require the denial of the said motion of

the plaintiff for the production of books, papers, records and writings of the defendant, since the above-entitled action has been brought by plaintiff to recover treble damages under the Act of October 15, 1914, c. 323, sec. 4 (38 Stat. 731; 15 U. S. C. sec. 15) as averred in paragraph 20 of plaintiff's statement of claim, and is, therefore, an action for a penalty.

3. The execution and performance of the several contracts between Pennsylvania Railroad Company and Merchants Warehouse Company, referred to in paragraph 1 of said motion, were admitted by Pennsylvania Railroad Company in paragraph 9 of its affidavit of defense, filed in the above-entitled case, in reply to allegations contained in paragraph 9 of plaintiff's statement of claim, that the said contracts had been made and carried out by both the said companies until May, 1931. Copies of said contracts were attached to plaintiff's statement of claim by a stipulation of counsel dated April 25, 1932, and filed of record. The fact that payments were made by Pennsylvania Railroad Company to Merchants Warehouse Company in accordance with said contracts requires no further proof, since it is admitted by the pleadings, and any bills and claims filed with Pennsylvania Railroad Company by Merchants Warehouse Company and any vouchers, drafts and checks, referred to in paragraph 1 of said motion, are not necessary for the proof thereof, or for the proof of any fact material to plaintiff's case. The said writings would establish nothing except the amounts of the said payments, which are irrelevant and immaterial to any issue in this case. Under the issues raised by the pleadings, the measure of plaintiff's damage, if any, is not affected by and cannot be based upon the amounts of said payments.

4. All the books, papers, records and writings which, in said motion, it is asked that Pennsylvania

Railroad Company be ordered to produce, have reference purely to alleged violations by Pennsylvania Railroad Company of sections 2 and 3 (1) of the Interstate Commerce Act of February 4, 1887, c. 104 (24 Stat. 379; 49 U. S. C. 2, 3 (1)), and amendments thereof, which prohibit carriers to grant special rebates and preferences; to wit, in paragraph 1, line 4 of said motion, reference is made to "allowances," and in the same paragraph, fourth line from the end, reference is made to "illegal rebates"; and in the affidavit of John J. Hickey, Esq., attached to said motion, reference is made in paragraph 3, line 6, to "allowances," and in paragraph 4, line 8, to "illegal rebates under the guise of compensation for handling services"; and in paragraph 3 (a) of said affidavit reliance is placed upon the compulsion in section 20 of the Interstate Commerce Act to preserve the records. As set forth in paragraph 2 hereof, the payments were admittedly made under the said contracts, and the question of rebates does not arise in this case, which is not a suit under the Interstate Commerce Act, but which has been instituted to recover treble damages for alleged violation of the Sherman Anti Trust Act of July 2, 1890, c. 647, secs. 1, 2 (26 Stat. 209; 15 U. S. C. 1, 2). No books or papers dealing with alleged illegal rebates or claims for rebates are relevant to any issue in this case, and their productic hould not be compelled.

5. In paragraph 2 of said motion, similarly, the production by Pennsylvania Railroad Company of certain demurrage records is asked, for the purpose of showing alleged preferences to Merchants Warehouse Company in the nature of unlimited storage on its tracks of cars, exempt from demurrage or other charges, in violation of sections 2 and 3 (1) of the Interstate Commerce Act; a similar reason for the production of said demurrage records is given in para-

graph 4 of the affidavit of John J. Hickey, Esq., attached to said motion; and in paragraph 3 (b) of said affidavit reliance is placed upon the compulsion of section 6 of the Interstate Commerce Act to preserve said records. As set forth above, with respect to the alleged rebates, any books, papers, records or writings having reference to alleged preferences with regard to demurrage, in violation of said Act, are irrelevant to any issue in this case, and their production at the trial should not be ordered.

6. In a proceeding before the Interstate Commerce Commission, in Docket No. 20968, to which reference is made in paragraph 3 (c) of the affidavit of John J. Hickey, Esq., attached to said motion, the above-named plaintiff, together with others, sought to have the said contracts between Pennsylvania Railroad Company and Merchants Warehouse Company, and the tariffs and regulations in accordance therewith, declared unlawful, as being in violation of the Interstate Commerce Act, and the Interstate Commerce Commission so ruled, its decision in the matter being reported in 160 I. C. C. 563. The said decision was sustained by the decision of the Special Federal Court in the Third Circuit, in the case of Merchants Warehouse Company v. United States, 44 Fed. (2d) 379, and finally affirmed in Merchants Warehouse Company v. United States, 283 U. S. 501. In the same proceeding before the Interstate Commerce Commission the above-named plaintiff asked for damages alleged to have been suffered as a result of the said contracts, tariffs and regulations, but the Commission held that the plaintiff had not shown that he was entitled to damages, having failed to prove that he suffered actual pecuniary loss attributable directly to the alleged unlawful practices. Thereafter, in a petition dated February 24, 1930, in the same proceeding, plaintiff asked for a reconsidera-

tion of the decision, in respect of reparation, and a further hearing. The said petition was denied by the Interstate Commerce Commission at a general session thereof, by an order dated June 1, 1931. In a subsequent proceeding before the Interstate Commerce Commission, begun August 23, 1930, Docket No. 23790, plaintiff sought to recover damages for similar alleged injury to its business for the period following that covered by the said prior proceeding. The Interstate Commerce Commission dismissed the complaint in the said subsequent proceeding, at the request of the complainant, by an order dated May 9, 1932. The books, papers and writings which plaintiff, in said motion, asks that Pennsylvania Railroad Company be ordered to produce are, thus, sought to be used by plaintiff as evidence in a second attempt to recover damages for the same alleged injuries arising out of the same transactions, for which damages were refused by the Interstate Commerce Commission, and Pennsylvania Railroad Company should not be ordered to produce them, since plaintiff has exhausted his remedy.

WHEREFORE, defendant, the Pennsylvania Railroad Company, prays that the plaintiff's motion be dismissed.

PENNSYLVANIA RAILROAD COMPANY,
By J. B. LARGE.

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

J. B. LARGE, being duly sworn according to law, deposes and says that he is assistant general traffic manager and an officer of the defendant, Pennsylvania Railroad Company; that he is authorized to and does execute the foregoing answer on behalf of said de-

fendant; and that the facts set forth in said answer are true.

J. B. LARGE.

Sworn to and subscribed before me this twenty-first day of August, 1933.

J. E. WILLIAMS,
Notary Public.
Commission expires March 9, 1935.

SUPPLEMENTAL ANSWER OF PENNSYLVANIA RAILROAD COMPANY TO MOTION UNDER 28 U. S. C., § 636, TO REQUIRE PRODUCTION OF WRITINGS ON THE TRIAL.

(Filed October 18, 1933.)

For further answer under paragraph 5 of Pennsylvania Railroad Company's answer to plaintiff's motion, under 28 U. S. C., sec. 636, to produce documents on the trial, Pennsylvania Railroad Company avers as follows:

That under the construction placed upon the contracts, referred to in paragraph 1 of said motion, by Pennsylvania Railroad Company and Merchants Warehouse Company, no demurrage was chargeable against Merchants Warehouse Company and consequently there are no records of demurrage during the period in which the contracts were in effect. Following the decision of the United States Supreme Court in Merchants Warehouse Company v. United States, 283 U. S. 501, the performance of the said contracts terminated, and beginning with June 1, 1931, demurrage was charged and records exist of the transactions after that date.

(Sgd.) BARNES, BIDDLE & MYERS,
Attorneys for Pennsylvania Railroad Company.

OPINION

Sur Motion Under 28 U. S. C. A., Sec. 636, for Production of Writings, &c.

(Filed October 20, 1933.)

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 16,772. March Sessions, 1932.
Trespass.

Walter A. Bailey, Trading as Bailey Warehouses,

v.

Pennsylvania Railroad Company and Merchants Warehouse Company,

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No. 16,774. March Sessions, 1932.
Trespass.

Terminal Warehouse Company

v.

Pennsylvania Railroad Company and Merchants Warehouse Company.

DICKINSON, *J.*

The like motion is made in each of the above cases and may be disposed of as one. The defendants interposed a statutory demurrer to the plaintiffs respective demands. This was based upon clearly defined propositions of law. Rightly or wrongly the questions of law raised were ruled against the defendants. Incidentally we adhere to the conclusions then

reached. Even if our views were now otherwise, we must none the less follow the law as laid down because it has become for the time being the law of the case. It would be little short of an abomination for the Court in the same case on one motion to hold the law to be one thing and on another motion to hold it to be otherwise. The ruling on the statutory demurrer is an underlying obstacle to the objections to the present motion. In essentials the present objection is presented in the question of why require the production of voluminous records at the trial when the plaintiff has no case? The logic of the objection is compelling if the premise is admitted. The premise however is that the plaintiff has no case.

To sustain these objections to the present motion we must in consequence find the plaintiff to have no cause of action. We have already ruled that a cause of action is averred. Whether or not it can be proved is a wholly different question. The plaintiff asks for the production of the records in question in its efforts to supply the required proof. This suggests an all sufficient answer to the defendants' position.

The high respect we entertain, in common with every one else, for the experienced counsel for defendant calls for a more specific answer to the objections made. The motion is based upon a Statute found in 28 U. S. C. A., Section 636. Without quoting the verbiage of the Act it requires the production of books or writings in the possession of the party "which contained evidence pertaining to the issue." A reference to the opinion handed down in disposing of the statutory demurrer renders unnecessary a fact recital.

The first objection asserts impertinence of any facts which the records asked for would disclose beyond what is admitted of record by the affidavit of defense. This assertion is based upon the proposition

that all which the records will show is the fact of payments to the favorite warehouseman and the sum of the payments. This objection may be discussed in connection with others.

The second objection is that the disclosure of the evidence would be self-incriminatory, and for this reason would not be enforced. We do not understand this objection to be urged, and we pass it without discussion.

The third objection is that to which we have already referred. It is expressed in the language of counsel "because plaintiff has no cause of action under the Sherman Act and therefore no evidence is admissible."

This presents the real objection urged. We have already indicated that the Court should adhere to the ruling made notwithstanding any change of view respecting its merits. Independently of this view, as also already stated, we have experienced no change of view on this question of a cause of action. If we took the same view taken by counsel for the plaintiff of what the cause of action averred is we would be in accord with them in the conclusions they reach. We have already expressed our views with such fullness that little would be gained by a restatement of it. The view of counsel for the defendants, it seems to us, comes to this, that they read the statement of claim as a complaint that the defendants had indulged in practices condemned by the Commerce Act to the injury of the plaintiff. This is to ignore, or at least overlook, the truth that we are concerned with two Acts. One is the Commerce Act which condemns the practices to which the defendants had resorted. The other is the Sherman Act which gives under certain conditions both a cause of action and a right of action for an injury which is the result of a conspiracy in restraint of trade in interstate commerce transactions.

The Commerce Act gives a remedy to the injured party of any infraction of that law; the Sherman Act likewise gives the remedy for infractions of that law. The two wrongs are in their nature wholly distinct and separate. The complaint voiced in the statement of claim here is not, as counsel for the defendants view it, complaint of an infraction of the provisions of the Commerce Act but wholly for the legal injury arising under the Sherman Act. The complaint is not of the practice condemned by the Commerce Act in itself but such practice is merely one of instrumentalities in the working out of the conspiracy condemned by the Sherman Act. If we are wrong in this attempted distinction, we are bound to concede that the ruling made is wrong, but right or wrong, having been made, it would be illogical to first hold that the plaintiff had a cause of action and a remedy under the provisions of the Sherman Act and then to hold that evidence in support of this right of action would not be required to be produced because there was no right of action which evidence, if produced, would support.

We are as appreciative as counsel of the practical wisdom of avoiding the protracted trial which looms ahead of us. If any way can be devised of bringing the respective contentions of the parties to a point which can be disposed of as a question of law, we will welcome it. We have no doubt that the experienced counsel in this case will each be considerate of the other and probably save the physical production of the books and writings which are the subject of this motion. In this effort they will be seconded by the Court.

The motion made is allowed, and a formal order, if necessary, may be submitted.

DEFENDANT, PENNSYLVANIA RAILROAD COMPANY'S EXCEPTION TO ORDER UNDER 28 U. S. C., SECTION 636, FOR PRODUCTION OF WRITINGS, ETC.

(Filed July 2, 1934.)

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA,

No. 16,774. March Term, 1932.

Terminal Warehouse Company,

v.

Pennsylvania Railroad Company and Merchants Warehouse Company.

AND NOW, July 2, 1934, comes the defendant, The Pennsylvania Railroad Company, and asks that the Court grant it an exception to the order entered October 20, 1933, under 28 U. S. C. Section 636, allowing plaintiff's motion for production of certain documents, writings and records, of Pennsylvania Railroad Company, mentioned in the said motion, upon the trial of the case.

THE PENNSYLVANIA RAILROAD COMPANY,

By its attorney,

(Sgd.) JOHN HAMPTON BARNES.

ORDER.

(Filed July 2, 1934.)

And Now, July 2, 1934, an exception is granted to defendant, The Pennsylvania Railroad Company, nunc pro tunc, to the order entered October 20, 1933, under 28 U. S. C., Section 636, allowing the plaintiff's motion for the production of certain documents, writings and records of The Pennsylvania Railroad Company, mentioned in the plaintiff's said motion, upon the trial of the case.

(Sgd.) O. B. Dickinson, *J.*

BILL OF EXCEPTIONS.

(Filed August 8, 1934.)

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA,

No. 16,774. March Term, 1932.

Terminal Warehouse Company, a Corporation,

v.

The Pennsylvania Railroad Company, a Corporation, and Merchants Warehouse Company, a Corporation.

BE IT REMEMBERED that in the said term of this court came the said plaintiff into the said court and impleaded the said defendants in a certain statutory suit for treble damages arising under the Acts of Congress of July 2, 1890, c. 647, sections 1 and 2, 26 Stat. 209, 15 U. S. C., sections 1 and 2, and of October 15, 1914, c. 323, section 4, 38 Stat. 731, 15 U. S. C., section 15, in which the said plaintiff declared as shown in the statement of claim, and the said defendant pleaded as shown in their respective separate affidavits of defense. And thereupon issue was joined between them.

And afterwards, to wit: at a session of said court, held at the district aforesaid, before the Honorable Oliver B. Dickinson, Judge of the said court, the nineteenth day of March, A. D. 1934, the aforesaid issue between the said parties came to be tried by a jury of the said district, for that purpose duly impanelled, at which day came as well the said plaintiff as the said defendants by their respective attorneys; and the jurors of the jury aforesaid impanelled to try the said

issue, being also called, came and were then and there in due manner chosen and sworn or affirmed to try the said issue; and upon the trial the counsel for the said respective parties offered their evidence as particularly set forth in the following stenographic notes of testimony which is set forth in condensed and narrative form, save as a proper understanding of the questions presented on appeal may require that parts of it be set forth otherwise; and the evidence in the cause being closed, the learned trial Judge charged the jury and affirmed or refused to affirm points presented on behalf of the defendants as hereinafter set forth and as follows:

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA,

No. 16,774. March Term, 1932.

Terminal Warehouse Company, a Corporation,

v.

The Pennsylvania Railroad Company, a Corporation, and Merchants Warehouse Company, a Corporation.

Philadelphia, Pa.,
March 19, 20, 21, 22, 23 and 26, 1934.

Before: HON. OLIVER B. DICKINSON, *J.*, and a jury.

Present: THOMAS RAEBURN WHITE, ESQ., JOHN J. HICKEY, ESQ., and RICHARD C. BULL, ESQ., for the plaintiff;
JOHN HAMPTON BARNES, ESQ., and PHILIP PRICE, ESQ., for Pennsylvania Railroad COMPANY, a defendant;
M. HAMPTON TODD, ESQ., ROBERT T. MCCRACKEN, ESQ., and GEORGE G. CHANDLER, ESQ., for Merchants Warehouse Company, a defendant.

Jury sworn March 19, 1934.

EVIDENCE ON BEHALF OF THE PLAINTIFF.

MR. WHITE: If the Court please, I offer in evidence paragraph 1 of the plaintiff's statement of claim and the corresponding paragraph of the affidavit of defense. That is purely formal, and I will not read it.

(The said paragraphs read, respectively, as follows:

"1. The Terminal Warehouse Company, hereinafter referred to as 'plaintiff,' is a corporation duly incorporated under the laws of Pennsylvania."

"1. Admitted.")

I offer in evidence paragraph 2 of the statement of claim and paragraph 2 of the affidavit of defense.

(The said paragraphs read, respectively, as follows:

"2. The Pennsylvania Railroad Company, hereinafter referred to as 'Railroad Company,' is a corporation duly incorporated under the laws of Pennsylvania, and a common carrier for hire engaged in the transportation of freight and passengers to and from Philadelphia, Pennsylvania, from and to points within the Commonwealth of Pennsylvania and in other States."

"2. Admitted.")

I offer in evidence paragraph 3 of the statement of claim and paragraph 3 of the affidavit of defense, which simply states the incorporation of the Merchants Warehouse Company.

(The said paragraphs read, respectively, as follows:

"3. The Merchants Warehouse Company, hereinafter referred to as 'Merchants Company,' is a corporation duly incorporated under the laws of Pennsylvania."

"3. Admitted.")

I also offer in evidence the first sentence of paragraph 4 of the statement of claim, reading:

"Plaintiff, is, and during the past six years and much longer has constantly been engaged in carrying on a general warehousing business in the City of Philadelphia, Pennsylvania";

and the corresponding following sentence from paragraph 4 of the affidavit of defense:

"Railroad Company admits that plaintiff, during the past six years and longer, has been engaged in carrying on a general warehousing business in the City of Philadelphia, Pennsylvania, . . ."

I offer in evidence in connection with all these averments, as a whole, the affidavit of defense of the Merchants Warehouse Company, which is in a single paragraph and general in form.

Mr. McCracken: Just a moment. You offer in evidence the affidavit of defense of the Merchants Warehouse Company?

Mr. White: Yes; it is just simply an affidavit of defense saying that they were not called upon to answer.

Mr. McCracken: I do not see that I could object to the offer, if you want to offer it.

Mr. White: It is an averment that the defendant has been advised by counsel that he does not need to answer, and whatever legal effect it might have——

Mr. Barnes: You had better read it all, Mr. White.

Mr. White: Very well, I will read it:

"George M. Richardson being duly sworn doth depose and say:

"1. I am Treasurer and General Manager of the Merchants Warehouse Company, one of the defendants in the above entitled cause and make this affidavit of defense on its behalf.

"2. I deny each and all of the averments in the plaintiff's statement of its cause of action wherein it avers that the defendants entered into a conspiracy to restrain interstate commerce and to monopolize trade among the states.

"3. I am advised by counsel, verily believe and therefore aver that this being an action of trespass to recover damages for an alleged tort, the defendant is not required to further answer the averments contained in the plaintiff's statement of its cause of action.

"And further deponent saith not."

Signed by George M. Richardson..

I offer in evidence paragraph 7 of the statement of claim, and paragraph 7 of the affidavit of defense, which I will not read unless you wish me to.

(The said paragraphs read, respectively, as follows:

"7. Railroad Company is and during the past six years and much longer has been the owner of a considerable block of shares of Merchants Company and has received substantial dividends therefrom."

"7. Railroad Company admits that it owns 1,245 shares of stock of Merchants Company. The total number of shares issued and outstanding of Merchants Company is 6,942 shares.")

I also offer in evidence paragraph 9 of the statement of claim, which I will read to the jury:

"9. By a series of written contracts extending over a period of thirty years or more, of which the more recent are dated July 1, 1916 (four contracts), January 25, 1917, July 3, 1918, April 10, 1922, March 4, 1925 and July 28, 1927, which con-

tracts are in the possession of the defendants and will be produced at trial Railroad Company or one of its subsidiary companies agreed to make certain payments to Merchants Company for alleged services rendered by it in and about the receipt and delivery of freight both incoming and outgoing; and Merchants-Company agreed to give preference in all its facilities to Railroad Company or one of its subsidiary companies and to extend the use of said facilities to no other railroad without its consent, which contracts were in fact carried out by both parties thereto until the payments were declared illegal by the Supreme Court of the United States in May of 1931."

I offer in evidence paragraph 9 of the affidavit of defense which, in reply, states:

"9. Railroad Company admits that it entered into the contracts with Merchants Company referred to in paragraph 9 of the Statement of Claim, copies of some of which, being those specifically referred to in plaintiff's Statement of Claim, are attached thereto by stipulation of counsel dated April 25, 1932, and filed of record, and that the said contracts were carried out by both parties thereto until May, 1931, when the Supreme Court United States declared them to be in violation of the Act of Regulate Commerce of February 4, 1887, c. 104; 24 Stat. 379; February 28, 1920, c. 91; 41 Stat. 479, in the case of Merchants Warehouse Company v. United States, 283 U. S. 501. Railroad Company avers the payments made under said contracts were for actual services rendered."

In connection with this paragraph I will read two contracts, I think, in full, and as being samples of the rest.

MR. MCCRACKEN: What page is that, Mr. White?

MR. WHITE: Page 68. Gentlemen of the jury, I am reading to you now one of the contracts, to which reference has been made, between Pennsylvania Railroad and the Merchants Warehouse Company. There are several of them, as you have heard. I will read this one in full and perhaps one other in full. They will all be offered in evidence for your inspection. I will read this agreement dated 25th day of January, 1917:

"AGREEMENT

Pennsylvania Railroad Company and Merchants' Warehouse Company.

THIS AGREEMENT made this twenty-fifth day of January in the year of our Lord one thousand nine hundred and seventeen (A. D. 1917) between The Pennsylvania Railroad Company, hereinafter called the 'Railroad Company', party of the first part, and the Merchants' Warehouse Company, a corporation organized and existing under the laws of the State of Pennsylvania, hereinafter called the 'Warehouse Company', party of the second part;

Whereas the parties hereto desire to enter into an agreement with respect to the handling and storage of flour, grain and other merchandise at the warehouses of the said Warehouse Company situated on the plot of land bounded by Delaware Avenue, Walnut, Water and Chestnut Streets, in the City of Philadelphia, and the State of Pennsylvania;

Now, therefore, this agreement witnesseth:

First. That the Railroad Company covenants and agrees:

(a) To maintain railroad tracks adjacent to the Warehouse Company's said warehouses situated on said plot of land, and to promptly do the necessary shifting to enable its cars to reach the warehouses aforesaid for the purpose of taking from and delivering to the same all freight to be shipped therefrom or destined thereto and shall and will take and deliver the same over its lines, at non-discriminatory rates, and in the same manner and with the same promptness that it delivers and receives like traffic at any other terminal point controlled by it in the City of Philadelphia.

(b) To pay to the said Warehouse Company for all services rendered by it in and about the receipt and delivery of freight for account of the Railroad Company, both incoming and outgoing at the said warehouses the amounts following: Three and one-half cents (3½¢) per barrel for each barrel of flour up to fifty thousand (50,000) barrels per month, two and one-half cents (2½¢) per barrel for each barrel over the said fifty thousand (50,000) barrels per month, and during the first two years of the life of this agreement, forty cents (40¢) per ton (of 2,000 pounds) for each ton of merchandise, and during the following years that the agreement is in force, thirty-five cents (35¢) per ton (of 2,000 pounds) for each ton of merchandise, except that no payment shall be made upon bulk freight nor upon freight the movement of which by the Railroad Company has been performed at a switching rate, nor upon material and supplies belonging to the Railroad Company.

(c) That so long as this contract is in force it will not enter into any contract with any other

person or corporation, making any allowance for terminal services in connection with the loading and unloading of merchandise to or from the warehouses located within the City of Philadelphia, nor shall it during the same time engage in the business of warehousing merchandise in the City of Philadelphia, except as hereinafter provided. Provided, however, that this covenant shall not be construed so as to prevent the Railroad Company from warehousing freight in its terminals as an incident to delivery thereof or from entering into contracts for storage or other disposition of refused or unclaimed freight, nor shall it be so construed as to interfere with the performance by the Railroad Company of all obligations imposed upon it by law in respect to the carriage, storage or delivery of traffic. Provided, further, that in the event of the Railroad Company building any additional storage warehouses within the City of Philadelphia, either in connection with its freight stations or otherwise, the Warehouse Company shall have the option of renting or leasing such storage warehouse at a a fair rental fixed by the Railroad Company, which option must be exercised by the Warehouse Company within sixty days after the same is offered to it by the Railroad Company; and only in the event of the Warehouse Company not being able or willing to undertake the operation of such warehouse, or warehouses, shall the Railroad Company be at liberty to engage in the business of warehousing merchandise in said warehouses, and in the event the Railroad Company engaging in such warehouse business the same shall be conducted on a commercial basis with due regard to the current storage rates at similar warehouses in the city of Philadelphia.

Second. The Warehouse Company covenants and agrees:

(a) To at all times accord to traffic passing over the lines of the Pennsylvania Railroad Company's System, of which the railroads of the Railroad Company form part, preference in the facilities furnished by the Warehouse Company over traffic passing over other lines; it being understood that without the consent of the Railroad Company the said facilities shall not be extended to traffic passing over other lines.

(b) To promptly load and unload and handle all freight received by it to be shipped over the lines of the Railroad Company or received by it for delivery to consignees, and in the case of incoming freight to promptly notify the consignees of the arrival thereof.

(c) To be responsible to the Railroad Company for the prompt collection of all freight and other charges upon inbound freight, payment to be made by the Warehouse Company to the Railroad Company on the fifth day of each month of freight and other charges due on account of all freight delivered to it during the preceding month, excepting, however, any such charges which the Railroad Company may, from time to time elect to collect direct from any consignee; and in order to secure the Railroad Company, the Warehouse Company shall furnish to it a bond with such good and sufficient sureties, and in such amount, as shall be approved by the Railroad Company, conditioned for the prompt payment of the said freight and other charges and for the performance by the Warehouse Company of all its other covenants hereunder.

(d) To indemnify and hold harmless the Railroad Company for all damage to, or loss of, freights in the custody or control of the Warehouse Company, and all liability by reason thereof, and to keep an adequate and sufficient line of fire insurance on all such freight to cover the liability of the Railroad Company therefor.

(e) To promptly notify the Railroad Company in writing of the failure of any consignee to remove freight, and, so long as it holds the said freight for account of the Railroad Company, to observe and comply with all directions with respect to such freight which may be received by it from the Railroad Company.

(f) To protect and indemnify the Railroad Company from and against all manner of liability on account of any acts of omission or commission on the part of it, the said Warehouse Company, in respect to merchandise received by it at said warehouses, to be forwarded over the Railroad Company's lines or to be delivered to consignees, and also from and against all manner of liability on account of receipts for merchandise issued by it.

(g) To keep its said warehouses in good order and repair and properly equipped for the prompt and effective handling of the traffic delivered to and received by it.

Third. It is hereby mutually agreed that at the expiration of the period during which the Railroad Company shall currently allow freight to remain at its warehouses before delivery without charge to the consignee, freight delivered by the Railroad Company to the Warehouse Company which has not been delivered to the consignee, or

party entitled to receive the same, or which shall not by direction of said Railroad Company have been returned to the shipper thereof, or otherwise disposed of, shall be regarded and treated as stored with Warehouse Company by Railroad Company for account of the owners thereof, and thereupon the Warehouse Company shall be entitled to deal with the property and to make such charges for its custody as it may lawfully and properly do, and shall be further entitled to dispose of the same in such manner, and at such times, as it may lawfully and properly do for the purpose of realizing its charges thereon.

Fourth. It is further agreed that no assignment of this agreement shall be valid without the consent of the Railroad Company, and that this shall apply as well to involuntary assignments, and that upon the happening of any legal proceedings the effect of which shall be to divest the title or possession of the said Warehouse Company, this agreement shall, at the option of the Railroad Company, cease and determine: Provided, however, that nothing contained in this paragraph Fourth shall be construed to prevent the assigning of the income and revenues to the Merchants' Warehouse Company from this agreement as additional security for mortgage bonds to be issued by the said Warehouse Company.

Fifth. This agreement shall take effect as of the first day of February, A. D. 1917, and shall continue in full force, and effect for the term of twenty (20) years from said date, that is, until the first day of February, A. D. 1937, and thereafter from year to year unless and until terminated at the end of said period of twenty (20) years or at the end of any one year thereafter by either of the said

parties hereto giving six (6) months previous written notice to the other of its intention so to do; Provided, however, that should the Warehouse Company in any respect violate or fail to comply with any of the conditions and covenants herein contained, then this agreement shall, at the option of the Railroad Company, on thirty (30) days written notice to the Warehouse Company, cease and determine and become absolutely void.

Sixth. That if the terms and conditions of this agreement shall be found to work onerously to the interests of either party hereto, the said terms and conditions shall, at the written request of either party, be subject to revision at the end of any period of two years; and if the parties hereto cannot agree upon such revision, or any question shall arise as to the proper construction of any of the provisions herein contained, or difference as to any act or duty claimed to be involved in the performance hereof, if the same cannot be amicably adjusted, then the same shall be settled by arbitration as follows: The party demanding the reference shall serve upon the other party a notice of such demand, stating the question upon which it demands the judgment of the references, and the name of one referee by it chosen. The party so notified shall, within ten days after receiving such notice, select a second referee, and notify the other party thereof in writing or if he shall fail to select a referee, the referee selected by the party demanding the reference shall select the second referee. The referees so selected shall within a reasonable time meet and select a third referee, and fix a time and place for hearing the parties, of which they shall be notified in writing. If any referee shall refuse to act, the party by whom he

was chosen shall select another to act in his place. The award of any two of said references made after hearing the party or parties who have attended in compliance with the notice required to be given, as above stated, shall be final and binding on the parties, and they severally hereby expressly agree to be bound thereby."

Then the rest of it is purely formal.

The lease, which I have just read to you, is typical of a number of them, but there are two types of leases, one such as I have read is simply an agreement relating to stores owned already by the Warehouse. There is another type in which the Railroad Company owned the land or in some cases owned the land and the stores; for example, the one for the Shackamaxon Stores, which is dated July 1, 1916. The first portion of it reads as follows:

"Witnesseth, That the Railroad Company for and in consideration of the rents and covenants and agreements hereinafter mentioned, which on the part of the Warehouse Company are to be paid, kept and performed, hath demised and let and by these presents doth demise and let unto the Warehouse Company, all that certain lot or piece of land situate in the Eighteenth Ward of the City of Philadelphia, Pennsylvania, bounded and described as follows: Beginning at an angle in the southeast line of Beach Street distant about one hundred and forty-seven feet northeast of the northeast line of Laurel Street, and extending thence northeastward along the said southeasterly line of Beach Street two hundred and seventy-five feet to a point; thence southeastward at right angles to said line of Beach Street fifty-five feet to a point; thence southwestward parallel with said line of Beach Street one hundred feet to a point, thence northwestward at right angles to last mentioned

course five feet; thence southwestward parallel with said line of Beach Street one hundred and seventy-five feet to a point; and thence northwestward at right angles to last mentioned course, fifty feet to the place of beginning.

"Together with the privilege of maintaining at the sole cost and expense of the Warehouse Company the warehouse building, owned by it, as now erected on the above demised land.

"To hold the same premises for and during the term of ten (10) years from the first day of July nineteen hundred and sixteen (1916), at and for the rent or sum of two thousand, two hundred and fifty dollars ($2,250.00) per year, to be paid in equal quarterly payments, in advance, on the first day of the month of July, October, January, and April, in each year during the said term;"

The remainder is essentially similar to the one I read to you.

MR. MCCRACKEN: There is one clause that is not the same. Clause "c" on page 69 doesn't appear in this or any other contract, Mr. White.

MR. WHITE: "c" on page 30, isn't that the same?

MR. MCCRACKEN: No. Turn to "c" on page 69. I don't think it is in any other contract, Mr. White.

MR. WHITE: Anyhow, I think, aside from that, they are about the same. Mr. Hickey says that is correct; that clause "c" is not in the other contract.

Now, if the Court please, I will offer in evidence the contracts between the Pennsylvania Railroad and the Merchants Warehouse Company, dated respectively July 1, 1916—four contracts of that date; one dated January 25, 1917, one dated July 3, 1918, one dated April 10, 1922, one dated March 4, 1925, and one dated July 27, 1927. I offer these as contained in a

printed pamphlet, which was covered by a stipulation between the parties, and which I would suggest be marked Plaintiff's Exhibit 1 as a whole, and be not copied in the stenographic notes. The offer is only as to the agreements set out therein. I wil add to the offer, at the request of Mr. Barnes, that there is attached to the contract of January 25, 1917, a copy of a bond duly given under the terms thereof by the Merchants Warehouse Company to the Pennsylvania Railroad, and that like bonds were given in the other cases, as required.

I will offer in evidence paragraph 14 of the statement of claim, reading as follows:

MR. BARNES: Wait a moment. There is a denial of that in the affidavit of defense.

MR. WHITE: I will withdraw the offer of paragraph 14 as Mr. Barnes does not feel that it has been admitted.

If the Court please, I offer in evidence, as Plaintiff's Exhibit No. 2, certain tariffs of the Pennsylvania Railroad Company, properly certified by the Secretary of the Interstate Commerce Commission, which were filed by the Pennsylvania Railroad, being tariffs covering the period of the suit; the first one filed on January 19, 1926, and the last one May 22, 1931, cancelling the previous one. They are entitled Allowances for Various Service, and they cover the period of this suit from 1926 to 1932.

I am reading to you from the tariffs: "At Philadelphia, Pennsylvania. When freight is handled through the warehouses shown below: allowances will be made on inbound and outbound freight by the [Pennsylvania] Railroad Company to these companies for services performed as follows: Merchants Warehouse Company—Delaware Avenue, [and other points,]: on flour in barrels, 50,000 barrels, or less, handled in one

month, 3½ cents a barrel, on flour in barrels over 50,000 barrels handled in one month, 2½ cents a barrel, on flour other than in barrels and on all other merchandise, 50 cents per 2,000 pounds." Now, then, that is one item here (indicating). There are listed other warehouses of the Merchants Warehouse Company: Fifteenth and Carpenter, the Merchants Warehouse Company, Thirty-first and Chestnut, Merchants Warehouse Company, Front and Bainbridge. Now, in one of these paragraphs, it fixes the price for flour, other than in barrels, and all other merchandise—two of them, I think—at 35 cents a ton. The first two are 50 cents per ton. The allowance at the top here (indicating) doesn't have anything to do with the case, because that is at Baltimore, Maryland— another warehouse at Baltimore, Maryland.

In the next paragraph, at a later date, there are covered more or less unimportant changes, but nothing which needs to be called to your attention; unless my friends think otherwise, until finally we get a tariff dated June 23, 1931, after the decision in question by the Supreme Court. I request that this be treated as a physical exhibit and not be entered in the stenographic notes of testimony.

(Marked Plaintiff's Exhibit 2.)

Mr. White: If the Court please, I offer in evidence as Plaintiff's Exhibit No. 3, a certified copy of certain extracts from Official Classification No. 48, giving certain rules relating to shipments and duties of the railroad with regard thereto, which we deem to be relevant to the proceedings in this case.

Mr. Barnes: If the Court please, we object to this —not to the form of it, but to the relevancy of it, it being regulations made by the Interstate Commerce Commission affecting matters over which it has jurisdiction under the Interstate Commerce Act, and has no

relevancy or application to any proceedings or any questions involved in alleged violation under the Sherman Anti-Trust Act.

MR. MCCRACKEN: I join in that objection for the same reason.

MR. WHITE: It is offered for the purpose of proving, in the first place, that it relates to the duties of the shipper——

THE COURT: Mr. White, I think it clearly has no direct bearing on the issues in this case, as I view it. I could see that it might be of help in order to throw light on some act of the defendant in this case.

(Discussion off the record at side bar.)

MR. WHITE: I will withdraw the offer for the present.

Testimony of HAROLD CLARKE, a witness called on behalf of the plaintiff, Terminal Warehouse Company.

DIRECT EXAMINATION.

I am chief clerk to the warehouse superintendent of the Pennsylvania Railroad. The position of superintendent of warehouses is vacant at the present time. I am not the active chief of the Warehouse Department. I take orders from the general traffic manager and the chief of freight transportation. My immediate superior is J. B. Large. He is not in the Warehouse Department. I am the only one in that department now under Mr. Large. I have been connected with the Warehouse Department of the Pennsylvania Railroad since January 15, 1923. I was then chief clerk to Robert L. Spencer who was the warehouse superintendent at that time. Mr. Spencer is not living now.

Witness was shown a pamphlet entitled "Warehouse Facilities of the Pennsylvania System," which pamphlet he recognized as a pamphlet issued by his department. Witness cannot say exactly when the pamphlet was issued; but would say around 1923 or 1924.

Q. Can you tell us what use was made of it by your department?

A. It was used for solicitation purposes.

Q. By whom?

A. By our department.

Q. By your department, you mean who,—not by you personally, but by others under you perhaps?

A. By me personally.

When he speaks of solicitation witness means freight moving via the Pennsylvania Railroad to be stored in the warehouses described in the pamphlet.

The pamphlet was furnished to representatives of the railroad and was quite widely distributed over the country. Witness cannot say whether or not the pamphlet was mailed to warehouse patrons generally over the country. He doesn't know.

(Pamphlet in question marked for identification Plaintiff's Exhibit 3.)

The map enclosed in the pamphlet as an exhibit was prepared by the Pennsylvania Railroad and was circulated as a part of the pamphlet. I don't know who prepared the map. It was a part of the pamphlet. Consulting the map, some of the principal points reached by the Pennsylvania Railroad are Chicago, St. Louis, Cincinnati, Erie, Pittsburgh, Harrisburg, Baltimore, Philadelphia, New York City, Washington, Toledo, Detroit and Norfolk. They are all reached by the Pennsylvania Railroad. Plenty of other points are reached.

(The pamphlet and map attached thereto were offered in evidence as Plaintiff's Exhibit No. 3, not to be copied into the record.)

CROSS-EXAMINATION.

By MR. BARNES:

In addition to the number of places that are shown on the map to which traffic was solicited, the pamphlet describes and names the following warehouses: The Duquesne Warehouse Company at Pittsburgh; Western Warehousing Company at Chicago; Keystone Warehouse Company at Harrisburg; Fort Erie Warehouse & Docks at Erie; Panhandle Storage & Warehouse at Cincinnati; Pennsylvania Terminal Warehouse Company of St. Louis at St. Louis; Terminal Warehouse Company at Baltimore; Merchants Warehouse Company at Philadelphia. The pictures and advertisements in the pamphlet and all that sort of thing are of warehouses all over the country. They are eight in number.

RE-DIRECT EXAMINATION.

The only warehouse company mentioned in Philadelphia was, however, the Merchants.

Testimony of GEORGE M. RICHARDSON, general manager and treasurer of the defendant, Merchants Warehouse Company, who was called, as if under cross-examination, as a witness on behalf of the plaintiff, Terminal Warehouse Company.

CROSS-EXAMINATION.

The name and location of the various warehouses and stations of Merchants Warehouse Company in Philadelphia are as follows: a warehouse in Kensington, known as the Kensington Stores; a warehouse in

the Shackamaxon district, known as the Shackamaxon Stores; a warehouse in the central delivery district, known as River Front Stores, which ties in with the Webb Warehouse; a warehouse consisting of a group of properties in what we call the Bainbridge Street district, known as the Bainbridge Stores, Front and Bainbridge Streets; a warehouse directly across the street on Front Street, known as Kenilworth Stores; a warehouse in the same district at Kenilworth Street, known as Franklin Stores; a warehouse in the downtown district, at Front and Federal Streets, known as Federal Stores; a warehouse in the middle city district and south city district, at Fifteenth and Carpenter Streets, known as Carpenter Street Stores; and also a warehouse at West Philadelphia at Thirty-second and Walnut Streets. We classify the operations as ten warehouses and I would say that the square footage of storage space in said ten warehouses is upwards of a million square feet.

Witness was shown and identified an advertising leaflet issued by Merchants Warehouse Company in connection with its advertising work, which leaflet states the locations of the warehouses with photographs. This leaflet was used by Merchants Warehouse Company, following the lead of the plaintiff, Terminal Warehouse Company, which had a most attractive pamphlet illustrating and describing the facilities of the plaintiff's new warehouse on Broad Street. This pamphlet correctly describes the warehouses and their locations; and contains certain photographs which the witness identified as being correct.

(The pamphlet was offered in evidence as Plaintiff's Exhibit No. 4—not to be copied into the record.)

I cannot fix the date of this pamphlet definitely in my mind, but I would say it is approximately three

years old. Witness was shown an advertisement of the Merchants Warehouse Company in a journal called "Commerce and Industry" in the January 1928 issue and another advertisement in the May 1928 issue, both of which advertisements appear to be exactly alike. Witness thinks these displays did appear in those issues. There is no question about that.

(The two advertisements were offered in evidence as Plaintiff's Exhibits Nos. 5 and 6—not to be copied into the record.)

Witness was shown two letters written by Merchants Warehouse Company, one signed by the witness, George M. Richardson, and the other by Godley, respectively dated June 16, 1928, and June 22, 1928, and respectively addressed to the Chicago jewelers Tool Works and George Steere & Sons. Witness stated that the two letters are apparently acknowledgments to inquiries received by Merchants Warehouse Company from the Chicago Jewelers Tool Works and George Steere & Sons. Godley was in the organization. The other letter was written by the witness.

(The two letters were offered in evidence as Plaintiff's Exhibits Nos. 7 and 8. Copies thereof follow:)

"PLAINTIFF'S EXHIBIT 7.

(Letterhead)

MERCHANTS WAREHOUSE COMPANY
General Office; 10 Chestnut St.
Philadelphia, June 16th, 1928.

Chicago Jewelers Tool Works,
10 South Wabash Avenue,
Chicago, Ill.

Gentlemen:

Attention of Wm. S. Reid

Replying to your inquiry of June 14th, which obviously is very much appreciated, we will be very glad indeed to provide accommodations for carload shipments of your machinery packed in crates of the weight and dimensions designated, basis of the following rates:—

(a) A storage charge of 40¢ per crate will be assessed to cover each period of thirty days or any fraction thereof.

If you will bill your shipments for delivery to us via the Pennsylvania Railroad, the cars will be placed on our sidings without your incurring any additional expense in the nature of drayage, switching or handling charges.

Under Pennsylvania Railroad tariffs now in effect, carload shipments properly billed for delivery to us are entitled to 48 hours free storage not including day of arrival, Sundays or legal holidays. Therefore any portion of your carload shipments delivered within the free period would be handled by us without expense to you.

Respecting proper notice to your customers, details of this character we feel absolutely sure of our ability to please you and will of course carefully carry into effect any instructions we may receive from you.

Again thanking you for the inquiry and trusting you will be able to favor us with your business, we remain,

Very truly yours,

MERCHANTS WAREHOUSE COMPANY
By George M. Richardson."

GMR*S

PLAINTIFF'S EXHIBIT 8.

(Letterhead)

"MERCHANTS' WAREHOUSE COMPANY
General Office: 10 Chestnut St.

Philadelphia June 22, 1928.

George Steere & Sons,
434 S. Dearborn St.,
Chicago, Ill.

Gentlemen:

Replying to your esteemed favor of the 19th, as to storage rates on your Elec. Signs measuring 30" x 6" x 10", weight about 20 lbs., only one size sign to be shipped in a carload, we are pleased to quote you as follows:

Storage, 1½¢ per crate each period of 30 days or fraction thereof.

Labor, 1½¢ per crate. (covers unloading car, placing in storage, and delivering either to car or tailboard of truck).

There would be no charge on orders filed with us before the car is unloaded, and hauled by your customers within 48 hours after the arrival of the car. If not hauled within 48 hours the regular storage and labor rates would apply.

Our warehouse is served by the Pennsylvania Railroad, enabling us to receive carload lots without cartage or switching expense and to make

either carload or LCL shipments without cartage or handling expense.

We would store your signs in our River Front Stores, which is very centrally located on Delaware Ave. between Chestnut & Walnut Sts., is of steel and concrete construction, and enjoys a very low fire insurance rate. The personal of this warehouse is very well trained in handling business such as yours and we feel sure that we can give you a service that will please you.

Thanking you for the inquiry and trusting that we may have the pleasure of serving you.

Yours very truly,

Merchants Warehouse Co.
By F. I. Godley."

In response to a subpœna I produce our office copy of a letter addressed to Sears, Roebuck & Company, dated September 20, 1928. This letter was written at or about that time in due course of business. I would not say that the letter is somewhat similar to the last two letters identified by me. It is a letter which can be considered a confirmation, I would say, of a verbal proposal we had submitted. It appears to be that to me. I don't recall the incident.

(The letter was offered in evidence as Plaintiff's Exhibit No. 9. A copy thereof follows):

"September 20th, 1928.

Sears, Roebuck & Company
Roosevelt Boulevard
Philadelphia, Pa.

Gentlemen:

Attention of Mr. Stuker

We take pleasure in confirming terms as follows, quoted Mr. Stuker covering space it was our

pleasure to submit for his inspection today in our Bainbridge Stores and Kenilworth Stores respectively:—

BAINBRIDGE STORES

(a) We have available approximately 75,000 square feet of floor area which we could place at your disposal upon reasonable notice.

(b) We would assess a rental charge of 40¢ per square foot per annum for any portion of this space assigned for your exclusive use, with the understanding that this rental charge would be billed to your account in twelve equal monthly installments in advance. This rental charge includes the use of all freight elevators serving the space that we propose to lease to you and also the joint use of the unloading and delivery platforms which serve the Water Street and Front Street side respectively, of this property.

(c) We would agree to make a contract with you for a minimum requirement of not less than 10,000 square feet of floor area with the understanding that additional units for areas of 10,000 square feet, would be placed at your disposal when and as required by you.

(d) This warehouse is finished throughout with hardwood floors, the allowable floor load being 550# per square foot; the lighting conditions are all that could be desired and is a fully sprinklered risk, the insurance rate now in effect, on contents being 25.8¢ per $100.00 per annum.

KENILWORTH STORES

(a) We have available approximately 90,000 square feet of floor area which we could place at your disposal upon reasonable notice.

(b) We would assess a rental charge of 35¢ per square foot per annum for any portion of this space assigned for your exclusive use, with the understanding that this rental charge would be billed to your account in twelve equal monthly installments in advance. This rental charge includes the use of all freight elevators serving the space that we propose to lease to you and also the joint use of the unloading and delivery platforms which serve the Water Street and Front Street sides respectively, of this property.

(e) We would agree to make a contract with you for a minimum requirement of not less than 10,000 square feet of floor area with the understanding that additional units for areas of 10,000 square feet, would be placed at your disposal when and as required by you.

(d) This warehouse is part mill construction and part brick and steel, the allowable floor load is 250# per square foot. It is a fully sprinklered risk, the insurance rate on contents now being 35.8¢ per $100.00 per annum.

The lighting circuits installed in both of these warehouses were designed to enable us to operate the space to good advantage as a general mer-

chandise warehouse and we feel sure will be adequate for your requirements.

It will be understood that we would make a charge equal to the cost to us for any current furnished to the circuits serving space reserved for your use, under the terms of this proposed contract.

Both properties are served by the Pennsylvania Railroad sidings and therefore carload shipments of merchandise properly consigned for delivery to these warehouses would be placed on our sidings without your incurring additional penalties in the nature of switching, demurrage or reconsigning charges.

If you are interested, we again wish to assure you that the officers of this Company will deem it a privilege and pleasure indeed to place our facilities at your disposal.

Again thanking you for the courtesies extended to Mr. Heid and the writer, we remain,

Very truly yours

MERCHANTS WAREHOUSE COMPANY
General Manager & Treasurer."

GMR:S

During the period covered by the claim in suit, from the fifteenth day of March, 1926, to the thirtieth day of April, 1931, the Pennsylvania Railroad paid Merchants Warehouse Company pursuant to the contracts and tariffs, offered in evidence. Witness did not consider such payments as allowances but as compensation for services honestly and fairly rendered. We were paid the sums specified in those contracts for the services therein provided up until some time in 1931—at the time when in view of the decision of the Court they were suspended.

Q. How much were you paid, how much were you actually paid in allowances?

MR. MCCRACKEN: We object to this. That certainly is not the test. If they are entitled to any damage at all, it is to the losses that they have suffered, and certainly not to the moneys paid to us.

MR. WHITE: I am not asking how much in dollars or in bulk they were paid. I am asking at what rate they were paid. It is already in evidence, but I want to find out why the tariff said 50 cents, and when the change took place.

MR. MCCRACKEN: I will withdraw the objection.

I think the rate at which we were paid from 1926 until 1932 varied from a minimum of 35 cents to a maximum of 50 cents. The change from 35 to 50 cents was prior to the date of this period under review. It goes back to war times. During the war, on account of the increased costs of operation, higher wages——

There are sidings serving all our warehouses. The railroad owned the houses that were leased. I don't know that, but I assume that the railroads own them because these operations were all organized before I was employed by the company. I would say that with two exceptions the sidings which serve all of our warehouses are all owned by the railroad company. The two exceptions are the river front stores and the siding that serves part of the Franklin group of warehouses—Bainbridge district. Speaking generally, however, the great bulk of the tracks which serve our warehouses are owned by the railroad. We do not pay the railroad any rent for the use of those side tracks. Our larger warehouses along the river front are served by the belt line and all three railroads have access to them. Our other warehouses are served by the Pennsylvania Railroad only.

RE-DIRECT EXAMINATION.

I think all of the warehouses that we operate, with the exception of two warehouses, are actually owned by the railroad. The railroads own the land in all those cases on which the railroad siding goes. They also own the land at Shackamaxon Stores. The two sidings to which I referred in answer to Mr. White as owned by us are the sidings that run into the buildings that we do not rent from the Railroad Company. These two sidings belong to us.

Q. According to those agreements that Mr. White offered in evidence this morning, all of those pieces of land belong to the Railroad Company, which you rent—you pay the railroad an annual rent for the land?

A. Yes, sir.

Q. You built the building on it?

A. Yes, sir.

Q. The siding is on the land——

A. You are speaking of Shackamaxon?

Q. I am speaking of the eight out of the ten warehouses—the railroad owns the land and buildings?

A. Yes, sir.

Q. The siding is on the land?

A. Yes, sir.

Q. Therefore you do pay rent for the land on which the siding is located?

A. Yes, sir.

Q. In that respect you pay rent for the siding?

A. Yes, sir; I didn't understand the question in that way.

Q. Those tracks are on the railroad's own land and you pay rent for that land every year?

A. Yes, sir.

Q. Do you understand the question now?

A. Yes, sir.

Q. Now, Mr. Richardson, you have been shown here a number of letters and a number of pamphlets.

Those letters and those advertisements went out, did they not, from your company, in an effort to get business?

A. Yes, sir.

That is all they went out for. It was my responsibility to get all the business I could. All this material, the letters and advertisements, had to do with business done in our Philadelphia stores. We have no stores anywhere else except in Philadelphia. We only operate in Philadelphia. When we sent word to a man in Chicago, or to a man on the Roosevelt Boulevard, or anywhere else, offering him space at so much a square foot, we were talking about having him rent space from us in one of these Philadelphia warehouses. That is all we were talking about. I do not have available a copy of the very attractive circular gotten out by the Terminal Warehouse Company prior to the time we got out our pamphlet and circular. I will try to find one. It was most attractive. Terminal Warehouse Company was away ahead of us. They went in for very extensive and wonderful display of advertising. This was our feeble effort to follow along, trying to catch up with them.

Testimony of ROBERT H. RISSINGER, a witness called on behalf of the plaintiff, Terminal Warehouse Company.

DIRECT EXAMINATION.

I am a certified public accountant with my office at 1401 Girard Trust Company Building, Philadelphia. Pursuant to an arrangement between counsel, I made an examination of certain records of the Pennsylvania Railroad Company at their office, which records were presented to me and related to claims which they paid to the Merchants Warehouse Comany for terminal

charges on merchandise handled from March 1, 1926 to March 31, 1931. I also made an examination of certain station records of the Pennsylvania Railroad Company relating to the detention of cars consigned to the various shippers in care of Merchants Warehouse Company at Philadelphia. That examination was made in the office of the Pennsylvania Railroad Company at 15 North Thirty-second Street, Philadelphia. The vouchers said they were payments for terminal allowances or terminal charges. We worked under the Deputy Controller's Department but we actually worked on the twelfth floor of the building in quarters assigned for our use. We examined vouchers of the Pennsylvania Railroad Company authorizing disbursements to the Merchants Warehouse Company and also examining the checks issued in payment of these vouchers.

I made a written report of the results of my examination, which report contained various schedules showing the information we had secured in response to our directions. That was prepared in the form of various schedules. Schedule No. 1 is a brief description of the plan utilized in effecting the payment of the claims referred to which are certain claims or bills presented by the Merchants Warehouse Company to the Pennsylvania Company covering the terminal charges on inbound and outbound freight. Several warehouses of the Merchants Warehouse Company listed below each presented separate bills for each month for the period indicated: Shackamaxon Stores, from March 1, 1926, to March 31, 1926; Kensington Hay House, from March 1, 1926, to March 31, 1931; Federal Stores, from March 1, 1920, to March 31, 1931; Kenilworth Stores, from March 1, 1926, to March 31, 1931; Bainbridge Stores, from March 1, 1926, to March 31, 1931; Franklin Stores, from September 1, 1927, to March 31, 1931; Thirty-first and Chestnut Street,

March 1, 1926, to February 28, 1931; Fifteenth and Carpenter Streets, March 1, 1926, to March 31, 1931; Webb's Warehouse, March 1, 1926, to March 31, 1931; River Front Stores, March 1, 1926, to March 31, 1931. That is all on that list.

The form of the bills presented were generally on invoice forms, printed for that particular purpose, which were headed, "Pennsylvania Railroad Company to Merchants Warehouse Company, Dr." A blank space was provided under the name of the warehouse company in which the location of the particular warehouse rendering the bill was inserted. The body of the invoice form was printed as follows: "To terminal charges on cars as follows: For the month of ———, flour, barrels received; flour, barrels, reloaded, flour, barrels handled, ——— at ———; merchandise, tons received; merchandise, tons reloaded; merchandise, tons handled; ——— amount at ———; cars received; cars reloaded; cars handled." The amount of claims was based on the tonnage of freight handled at each warehouse during the month for which the bill was rendered, computed at 50 cents per ton for all warehouses except Kenilworth Stores and Bainbridge Stores, which were computed at 35 cents per ton. The claims were accompanied by a detailed list showing weight and description of inbound and outbound shipments, on which payment was claimed. Each claim was certified to be correct by the railroad agent at the freight station serving the warehouse making the claim, before forwarding to the divisional or general office for approval for payment.

My report contains a description which I am now giving you with regard to what I did in that particular connection. I have stated in summary and in detail the amount of the allowances or claims paid during that period by the Pennsylvania Railroad Company to the Merchants Warehouse Company as shown by the

records examined by us in the office of the Pennsylvania Railroad. That is shown in Schedules 2 and 2A.

We were instructed to make an examination of the demurrage records that were kept with respect to shipments consigned in care of the Merchants Warehouse Company. In attempting to carry out the assignment we were advised by representatives of the Pennsylvania Railroad that no demurrage had been charged to Merchants Warehouse Company at any time during the period contemplated by our examination. That as a consequence no demurrage records with respect to shipments consigned in care of that company had ever been compiled, or were available for inspection. In the absence of such records it was necessary to assemble the information called for from such station records as were found available, from which detention of cars could be determined. The records examined were:

At Broad and Washington Station, which served the Fifteenth and Carpenter Streets warehouse of the Merchants Warehouse Company, we examined a record of car detention that was maintained at the station on Form A. D. 1364A. This record was a triplicate form compiled as a record of car detention and of demurrage chargeable thereon to shippers or consignees not under average agreement. Two copies of the form are forwarded for use of other railroad departments. The triplicate is retained as a freight station record. In the case of shipments consigned in care of the Merchants Warehouse Company, the form was not completed as to amount of demurrage chargeable, or as to information called for under date ordered and date placed, and unlike the forms for other consignees, all copies of the form were retained in the freight station office. From this record I transcribed the list of cars that were detained longer than three days, exclusive of Sundays and holidays. I have in-

cluded that list in this report, in Schedules A1A and A1CC.

My report also includes details of car detention in the Shackamaxon station for certain periods and details of cars detained at Webb's Warehouse, River Front Stores, for certain periods. We have schedules showing the detention at each one of those three stations for which no demurrage was charged. We made the examination only for certain periods, the period from March 1, 1926 to March 31, 1931. We examined the stations for particular months where it appeared we could get information most readily, because in the absence of a demurrage record being kept, it appeared that the time required to assemble the data would have been so great as to render it impracticable to do so. The results of our examinations are stated in schedule form showing the cars detained during the periods examined.

(The reports and supporting schedules of the witness, including the summaries showing the amounts of allowances and the extent of car detention, were offered in evidence by counsel for the plaintiff.)

Mr. McCracken: I object to any such admission of evidence, either as to the amount paid by the railroad to the warehouse company or as to the extent of the detention of cars. I would like to be heard upon that matter if there is any question about it?

Mr. Barnes: I object also to the admission of the exhibit. Your Honor will remember that at a certain stage in this litigation there was a petition to produce books and papers at the trial. We argued that very fully, and you made an order that they should be produced. I am not sure that it is in your order, but at all events there was an ar-

rangement made between counsel that an opportunity should be given to examine the books and records, the production of which were demanded.

THE COURT: Then we are to treat this as if the books were here?

MR. BARNES: Yes, we made an arrangement with Mr. White, and accordingly they sent some person to make the examination and I suppose this is that person.

Our contention is this, and Mr. McCracken has already indicated it, that the sum of money paid, the sum of money paid as shown by these schedules and statements attached to them, is not evidence of any damage suffered by these plaintiffs.

(Discussion off the record.)

MR. WHITE: This is a charge and claim for damages. It is claimed that the Terminal Warehouse Company had suffered in its business through meeting unfair competition, which grew out of this combination in restraint of trade or in violation of the Sherman Act, as we contend. The question is how much damage has the Terminal Warehouse suffered. If one of the elements, one of the overt acts complained of, is the payment by the railroad company to the warehouse company of these allowances, which the Supreme Court has held were illegal allowances,—if the amount of allowances paid was trifling, it is obvious that we were not hurt by it, we would not be hurt by it. If the amount of allowances paid was very large, we would be hurt. We do not claim now, nor never have claimed that the amount of the allowances paid was an item of our damage. We do not claim that at all, but we say that the amount of allowances which are paid is material in order to en-

able the jury to ascertain how much we have been injured, because, if as I say, the allowance is great, obviously the situation presented, which would cause us a loss, is a serious one. If the allowance were trifling, then we are not hurt.

As regards the question of demurrage, we have contended, and it has even been proven because admitted by Mr. Richardson, that where cars were detained in the yards of the railroad company, which were consigned to the Merchants Warehouse, no demurrage was paid. We have also shown, or we will show, that where cars were consigned to the Terminal Warehouse, they had to pay demurrage. Now, the question is, did that hurt us or did it not hurt us. If there were no cars detained, which were consigned to the Merchants Warehouse Company, it didn't mean anything to them, because they didn't have the advantage and the convenience of using cars over the free time without paying for them. On the other hand, if there was a large number of cars which were detained beyond the three-day time, and there were, it is quite evident that they had advantages, undue advantages, in that particular, and the amount of the advantages, as well as the amount of the allowances, it seems to me, have a very direct bearing upon the question as to what extent we were injured. I do not see how our case could be proven otherwise.

(Discussion off the record.)

THE COURT: I will reflect on this matter and give you a ruling in the morning. Is there any differentiation to be made in the minds of either of you between that part of the report which bears upon the demurrage and that part which bears upon the amount paid to the so-called agent?

MR. MCCRACKEN: Yes; I think there is a differentiation definitely. The part which bears upon the demurrage comes within the category which your Honor named. The part which bears upon the amount paid is a matter of dollars and cents they paid, although in the long run it comes to the same thing, so far as inadmissability is concerned. (Citing Interstate Commerce Commission v. The United States, 289 U. S. page 385.)

(Discussion off the record.)

MR. BARNES: I want to add another objection to the offer made at the end of last evening's proceedings, and which your Honor has not ruled upon yet, first, that the statements which are in the report to be presented are alleged to be allowances under a tariff—a schedule that the commission designated as allowances, and those matters are covered by the Interstate Commerce Act and have been dealt with between the parties in the proceedings before the Interstate Commerce Commission; second, the information contained in the report, obtained under the circumstances detailed yesterday, are information from defendant's records, and in our judgment it is not admissible against the defendant.

MR. MCCRACKEN: May I state my objections to the testimony? My objections are, first, that this evidence is admittedly not evidence of damage in this case. Second, that it is not evidence of a conspiracy to violate the anti-trust laws. Third, that this is evidence of an act or acts which, if they be illegal at all, are violative of the rulings of the Interstate Commerce Commission as interpreting the Interstate Commerce Act, and are hence exclusively within the jurisdiction of the commission. Fourth, that this evidence, if admis-

sible at all, is admissible only after the foundation has been laid for its admission by showing that the plaintiff has been actually injured thereby and has suffered pecuniary damage as a result thereof.

THE COURT: The Pennsylvania Railroad under an arrangement with the Merchants Warehouse Company carried freight which was delivered to the Warehouse Company for distribution to its patrons. This was done under a contract between the Railroad Company and the Warehouse Company by which the latter acted as a freight agent of the Railroad and a warehouse was designated as a freight station. The records of the railroad show the extent of this traffic and are offered in evidence for the double purpose of showing the amount of money received by the Warehouse as service compensation and the amount of demurrage charges, from the payment of which the Warehouse Company was excused. The offer is objected to both by the Railroad Company and by the Warehouse Company.

We held that as the present action is for the loss incurred by the plaintiff by reason of the conspiracy between the defendants to give the Merchants Warehouse Company a monopoly of the local warehouse business, the evidence is inadmissible. The defendants then offered it to be followed up with evidence that the sum received by the Warehouse Company for services and demurrage, from the payment of which it was relieved, not only enabled the Merchants Warehouse Company to give its patrons better rates than other warehouse companies were able to do, but that the Warehouse Company did actually give these better rates.

We think the offer thus followed up is admissible. Ordinarily we would not interfere with the order of proof followed by counsel, but we see no reason for not deferring the present offer until the promised evidence has been admitted.

We in consequence sustain the objection, with exception to the plaintiff, and with leave to re-offer the evidence after the promised evidence has been introduced.

MR. WHITE: I will withdraw the offer for the present. I intend to renew it later. I will excuse the witness for the present and call him later.

Testimony of ERNEST V. D. SULLIVAN, a witness called on behalf of the plaintiff, Terminal Warehouse Company.

DIRECT EXAMINATION.

I am and have been since December 1929 president of Terminal Warehouse Company. Before that date I served as vice-president and operating executive of the company from August 1921. Prior to 1921 I was employed by the company in various capacities, primarily solicitation of business. After I became vice-president and operating executive my duties were primarily the solicitation of warehouse business, general jurisdiction over the operating organization, that is, the engagement of clerks and labor and all the necessary personnel to operate the business, the fixing of wages and salaries, making of warehouse rates, and the providing of facilities for the proper handling of the merchandise we received. Since I have been president I have had general supervision of the business—over everything.

The warehouse business, as conducted in Philadelphia, may be explained in general terms as follows:

The out of town manufacturer, in order to sell his product in this market, must maintain what is commonly known as spot stock, in other words a stock of merchandise that he manufactures, in order that he can make prompt delivery to the wholesaler or retailer or jobber who handles his merchandise in this district. Naturally he has to get his product to this market in the most economical way. In order to maintain these spot stocks he either has to provide his own warehouse facilities or use those of a public merchandise warehouse. It would be uneconomical for most manufacturers to have their own warehouse facilities. As a result he negotiates with the public warehouse company to act as his representative in this market to receive the carloads of his product, which he ships to the warehouse company in carload lots in order to get the lower freight rate, unload the car and subsequently makes delivery to his local customers or makes reshipments to his out of town customers, in accordance with the instructions of the manufacturer.

In addition to the market for warehouse business, the local wholesaler or jobber at various times occasionally has need to store surplus merchandise in a public warehouse. In other words he does not have sufficient facilities to take care of all of the merchandise. Another group that use it would be the jobber or the broker or the sales agent, who only has an office in this locality and necessarily he must depend upon the public warehouseman to physically handle the merchandise that he sells and distribute it in this territory.

Speaking generally, the difference between carload rates and less than carload rates is that carload freight rates are considerably lower than less than carload freight rates. In many instances the difference between the freight rates in the carload rates and the less than carload rates is enough to offset the ware-

housing expense that the manufacturer has. Primarily the services for which the warehouseman makes a charge is for the handling and storage of the freight, handling of the car, sorting of it, putting it in storage, and subsequently selecting the order that the manufacturer presents to the warehouseman for delivery. Some products are delivered promptly and some remain there for several months. Some are immediately distributed. Other carload shipments, a portion of it, ten, twenty-five or thirty per cent. of it, may go out immediately, and the balance is put in storage for subsequent delivery.

I have some pictures of some of our warehouses. We have a warehouse known as Fairmount Stores located at the corner of Delaware Avenue and Fairmount Avenue, having a floor area of approximately 90,000 square feet, with side-track facilities inside the building for five cars. This is the exterior photograph and these are the interior photographs. Our Spring Garden warehouse is located at the corner of Delaware Avenue and Spring Garden Streets and has approximately 184,000 square feet and a siding capacity served by both the Reading and Pennsylvania Railroads for six cars at one time. These photographs, which have been marked as Plaintiff's Exhibit No. 10 —one is an actual photograph of the exterior of that building and two are of the interior. Our switches run into the building. This photograph shows the cars in place for unloading.

MR. WHITE: I will offer these photographs in evidence.

Our next warehouse is known as the Brown Street Stores. It is located at the northeast corner of Front and Brown Streets. This building is a modern, concrete, sprinkled building with low insurance rates, and has about 270,000 square feet and has side tracks in

the building, connecting with both the Reading and Pennsylvania Railroads, with a capacity of spotting thirteen cars on the inside of the building and five cars on the track which is right alongside the outer wall. When I speak of "spotting cars" I mean putting them in place on the track. I have a photograph of that. Scales and small trucks are shown in one of the interior photographs. We have an adequate supply of platform trucks and modern high-speed elevators, barrel hoists and labor-saving devices in general.

MR. WHITE: I offer these in evidence as Plaintiff's Exhibit No. 11, photographs of the exterior and interior of the Brown Street Stores.

The next building is what is known as the sales building and is located at the corner of Delaware Avenue and Poplar Streets. This building is also modern, concrete and sprinkled, with low insurance rate, and has a floor area of approximately 130,000 square feet, with a siding capacity connecting with both the Reading and the Pennsylvania Railroads for four cars at one time. I produce a photograph of that building, exterior and interior.

MR. WHITE: I offer this in evidence as Plaintiff's Exhibit No. 12.

The next building which we operated during this period was known as Pier 31 North. That building had approximately 65,000 square feet and had direct siding connections with the Pennsylvania Railroad and the Reading Railroad, with capacity for six cars at one time. I haven't any picture of that.

The next two facilities are also piers, known as 35½ and 36 North, having a storage area of 110,000 square feet, with a siding capacity of sixteen carloads at one time. I have no photograph of that.

The next building is one that was located at the corner of Twenty-fifth and Locust Street, where we operated 100,000 square feet of floor space with a siding capacity for two cars at one time. I have no photograph of that building.

The next building is known as the Twelfth Street Stores, which had a floor area of 65,000 square feet, with a siding capacity of two cars on the Reading Railroad.

The next building is known as the Front Street Stores, located at Front and Race Streets, with an area of 170,000 square feet. That building did not have any track connections but was served by trucks. The next building is our Columbia Avenue warehouse, Fifteenth and Columbia Avenue, which has an area of 64,000 square feet, and likewise has no track connections.

We have altogether eleven warehouses or places with a total storage capacity of upwards of a million square feet. We are approximately the same size as the Merchants.

In addition to the warehouses mentioned, we have other facilities such as sidings, elevators, labor-saving devices, platform trucks and trucks—in fact everything that is needed for the expeditious and economical handling of package freight. When I speak of freight handled through the warehouse I refer to package freight which, as it is commonly known, is merchandise or goods that are contained in packages, such as a carton of soap or a bag of flour, a crated stove, or something of that nature.

I will assume a shipment from some customer of ours from some point in the United States and I will explain to the jury exactly what we do with it, so that you may understand just how our business is conducted. Taking as an illustration Lever Brothers Company, who are located in Cambridge, Massachu-

setts, and are manufacturers of toilet soaps, laundry soaps, and edible products of all kinds. They normally ship all these products through our warehouse. The procedure is as follows: Naturally the first procedure is the consummation of a contract with Lever Brothers which covers the services and the charges that we are to make. After that contract is made, Lever Brothers ship carloads of their products to us. At the time they ship it they send us a manifest showing the contents of the car, and the quantity, brands, number of each, and also any specific instructions that they may have to give as to the distribution of the car upon its arrival at our warehouse. In the usual way the cars are consigned "Lever Brothers, care of Terminal Warehouse Company." Most manufacturers consign to themselves in care of the warehouse company. That is the general procedure.

Assuming that a car has been shipped to Philadelphia, care of our warehouse, when the car arrives in the yard of the railroad at Philadelphia, the railroad sends us a written arrival notice giving us information as to the initials, car number, and the consignment instructions. After receiving that, we notify the railroad as to what location to place the car and what track in the warehouse. When the railroad places the car in our warehouse, our first step is to see the seal —look at the seal upon the car door—each door of the car. There are two doors and each door is sealed by the shipper with his own particular seal, which would indicate upon arival at destination whether or not the car has been opened or tampered with in transit. If the seal was intact it would show that it had not been tampered with. If it was broken it would be an indication that it had been tampered with or opened in transit. We make a record of the condition of the seal.

We of course open the car doors and start to unload the car in accordance with the instructions that

we receive from the manufacturer. A portion of that car may go into storage. Another portion of it may go on the platform available for immediate distribution. In unloading that car naturally we have to carefully check the packages to see whether or not there has been any damage sustained in transit. We also have to check the various brands and separate them on the floor, either on the first floor or an upper floor, if it is destined for storage. Then we comply with the instructions we receive for that portion to be immediately distributed, and the balance is placed into storage, awaiting future orders which are given to us by the manufacturer for the distribution of their product.

That part of the carload which is intended for immediate delivery may be delivered by the customer's truck which arrives at the enclosed platform that we have in our building, or it may be delivered by our truck to the Lever Brothers' customers within this immediate trade area, depending upon our instructions. As a rule the contents of a car of soap, for instance, would go to as many as twenty-five or thirty consignees or customers of Lever Brothers.

I forgot to mention that after the unloading of the car we of course make a detailed report as to the out-turn of that car. That is also entered on our stock records. Lever Brothers from time to time will send us written orders or they will telephone us to deliver so many cartons or boxes of a certain brand of soap to one of their customers in this territory, or they may instruct us to ship a certain number of cartons to one of their customers in Allentown or Bethlehem or some contiguous point.

At the time of the receipt and unloading of the car, we very frequently reship a portion or portions of the shipment. In that case, we first have to unload the car, note its condition and separate it as to brands

and marks. If a portion of it is to be reshipped by railroad, we have to stencil the goods with the names and addresses of the ultimate consignee, making out a bill of lading, getting it signed by the railroad; then load that in the car carefully so that it will not sustain any damage in transit.

Taking an average, I would say that approximately 30 or 35 per cent. of the bulk of business handled through the warehouse would be reshipped by rail and the balance would be taken from the warehouse by trucks. Very frequently it happens that the containers of the freight have been damaged in transit. In that case, we perform what is known as a recoopering service. By that I mean that we take the contents of the damaged carton out of it and repack it into a new carton, thus making it salable. That which is damaged beyond the possibility of sale is turned over to the carrier. A claim is then filed by the owner of the merchandise.

The description which I have given you is typical of the shipments that go through our warehouse every day. By far the greater portion of our business, I would say about 95 per cent. of our total business, originates in points outside of Pennsylvania in such cities and states as Cleveland, Ohio, St. Louis, Missouri, Chicago, Illinois, Detroit, Michigan, New York City, and practically every city and state in the United States. The freight comes mostly by railroad. We get business by personal solicitation; and by personal solicitation I mean that I, myself, and other solicitors that we employ, call on prospective users of warehouse service and endeavor to interest them in our facilities and service. In addition to personal calls we also address solicitation letters to them. We advertise in trade journals, issuing pamphlets which we send to the shipping public. I did not bring the circular which

Mr. Richardson spoke about in such a complimentary tone yesterday because I thought he would.

Referring to the package freight business our charges are determined as follows: there is a rate determined in accordance with our tariff for the storage and handling service. That varies, of course, in accordance with the weight and volume or size of the package and the nature of the business.

Q. Are separate charges made for storage and handling?

A. Yes, sir.

Q. How about such things as recoopering?

A. A separate charge made for that also.

Q. Have you looked over your books to see the volume of your business—I mean handling package freight only, during the period covered by this unit, approximately per annum?

A. Yes, sir. It averaged approximately 153,000 tons per year.

Q. You may state whether a part of your business is unconnected with this——

A. Yes, sir; we have other departments in our business, such as our trucking department, our automobile storage and handling. We also have a household goods warehouse.

Q. Those departments of your business have no connection with the present suit?

A. No, sir.

During this particular period we averaged about ninety-seven employees in the handling and storage of package freight. I am acquainted with Mr. Richardson, and the Merchants Warehouse Company, and their warehouses. I have seen all of their warehouses. I have been inside some of them. Mr. Richardson's description of them in a general way was accurate. With regard to capacity, location and character of Merchants Warehouses as compared with ours, they

are both about the same. In other words, our facilities and the locations of them are comparable to those of the Merchants Warehouse Company. I would not admit they are any better than ours. I have seen the pamphlet entitled "Warehouse Facilities of the Pennsylvania System" which has been offered in evidence as Plaintiff's Exhibit No. 3. The description in that pamphlet, "Our properties are modern buildings, the last word in concrete and steel construction, fully equipped with automatic sprinkler system, low insurance rate on buildings, varying from a minimum of .056 cents per $100 to a maximum of .138 cents per $100 per annum" would be an accurate description of our warehouses or such of them as are of that character. When I say a sprinkler system, I mean that the building is equipped with a sprinkler system so that in the event a fire starts these automatic sprinkler heads go off and discharge a quantity of water on the merchandise to put out the fire.

The warehouse services that we perform are exactly comparable to those performed by the Merchants Warehouse Company. I imagine that Merchants warehouses are operated efficiently. I don't know anything about their personnel, whether or not it is actually operated efficiently, but I assume it is. I know that ours is operated efficiently. We are in daily competition with Merchants Warehouse Company.

Witness was shown a paper designated "Allowances for various services," published by the Pennsylvania Railroad Company and admitted in evidence as Plaintiff's Exhibit No. 2. That exhibit provides, "At Philadelphia, Pennsylvania, when freight is handled through the warehouses shown below, allowance will be made on inbound and outbound freight by the railroad company for services performed as follows: Merchants Warehouse Company (named at four or five different locations—the first one reading)

Delaware Avenue, Water, Chestnut and Walnut Street: on flour in barrels, 50,000 barrels or less handled in one month, 3.5 cents per barrel; on flour in barrels over 50,000 barrels handled in one month, 2.5 cents per barrel; on flour other than in barrels and all other merchandise, 50 cents for 2,000 pounds." Terminal Warehouse Company received no allowance for any such service either from the Pennsylvania Railroad or anybody else.

On some occasions it happens that cars consigned in care of our warehouse cannot be or are not handled within three days or two days. The reason for that in the normal conduct of business is that sometimes there is an accumulation of cars for a particular warehouse and we are unable to handle them promptly. At other times we withhold unloading the car awaiting distribution papers from the shipper. In case a car is detained longer than two days, other than Sundays and holidays, the result is that we have to pay the railroad what is known as a demurrage charge at the rate of $2 per day per car for the first four days, exclusive of Sundays and holidays, and thereafter a charge of $5 per day, inclusive of Sundays and holidays. At the request of my counsel I have brought a sample receipted demurrage bill that we actually paid during the period.

MR. WHITE: I will offer in evidence as Plaintiff's Exhibit No. 13 a receipted demurrage bill which has been produced as illustrative of the bills paid by the witness when cars were detained.

MR. MCCRACKEN: I object to the offer, if it be offered as any evidence of damage relied upon in this case. Of course, I do not object to the offer if it is simply offered for the purpose of showing a practice between the parties.

MR. WHITE: This is offered only to show the practice, and that he did pay demurrage.

We have side tracks on our property both outside of and inside of our warehouses. We can spot or place fifty-nine cars on all of our sidings at one time. We pay for these side tracks and maintain them.

Q. What contracts do you make with the railroad, holding them harmless from all loss in case of injury occasioned to people working on the side tracks?

A. We have what is known as a siding agreement with the railroad.

I produce one of these siding agreements as an indication of what we agreed to.

> Mr. White: I will offer in evidence as typical of all sidetrack agreements, the joint agreement between the Pennsylvania Railroad, the Philadelphia & Reading Railroad Company, and the plaintiff, dated April 5, 1923, as Exhibit No. 14.

We pay for the side track entirely from the point where the tracks reach our property and go into the warehouse. We pay for it even beyond our property where it makes a connection with the railroad. It is then partially amortized by the railroad through the allowance of so much per car during the first five-year period. Ultimately we pay one-half of the costs of connecting the main tracks up to the point where our property begins.

Witness was shown an advertisement of the Merchants Warehouse Company which had been identified by Mr. Richardson and had been offered in evidence as Plaintiff's Exhibit No. 6. The attention of the witness was called to this offer in the advertisement: "Carloads received and distributed l. c. l. and carload lots shipped to all points served by the Pennsylvania System without added expense."

When asked whether Terminal Warehouse Company offers that service to its customers, witness replied: We can perform those services. We cannot do

it without expense. We have to make a charge to our customer because of the expense we have in connection with the performance of the service—the unloading of the car, the checking of it, the reloading of it, and the separation as to marks and brands. That costs us considerable wages and salaries. We do not get allowances from the Pennsylvania Company, so that we therefore have to make a charge to our customer for performing that service. The fact is that we cannot meet that offer as written.

The attention of the witness was called to Plaintiff's Exhibit No. 3, entitled "Warehouse Facilities of the Pennsylvania System," in which a number of statements are made; and his attention was specifically called to the following statement in the introductory part of the Merchants Warehouse, namely: "This company, acting in the capacity of terminal agent for the Pennsylvania Railroad Company, receives, stores and distributes all kinds of package freight consigned for local delivery, and also forwards less than carload and carload shipments to all points served by the Pennsylvania System without additional cost to the shippers." Witness stated that Terminal Warehouse Company was not able to meet that offer of service.

I will explain a little more fully what is involved in receiving, storing and distributing all kinds of package freight consigned for local delivery.

First of all, we have to provide the sidetrack facilities for the car to be placed upon. Then we have to have labor, labor foremen, checkers, delivery clerks, stock clerks, all of which we have to pay salaries and wages to, to perform those services, and necessarily we have to make a charge to our customer for performing those services to reimburse us for the expense involved, because we do not get any allowances from the Pennsylvania Railroad.

With reference to the further statement in Plaintiff's Exhibit No. 3: "Forward less carload and carload shipments to all points served by the Pennsylvania system," that means a still further service of marking or stenciling the name and address of the ultimate consignee of the package or packages and then loading them carefully in a car. We cannot do that without being paid for it.

Q. I do not wish to unduly prolong this branch of the examination, but I call your attention to the fact that on nearly every page of this pamphlet which relates to the Merchants Warehouse, an offer of the same kind is made. Your answer would be the same, would it not, as to each one?

A. It is not exactly the same, I do not believe—the advertisements as to the Merchants and the other warehouse companies.

Q. I am speaking only of the Merchants. For example, on the very last page, in speaking of the Merchants Warehouse, the Carpenter Street warehouse, it is stated that "less than carload shipments can be forwarded to all points served by the Pennsylvania, as well as carload shipments, without additional expense of any kind to the shippers." You cannot do that?

A. No, sir.

The attention of the witness was called to the following paragraph in Plaintiff's Exhibit No. 7, which has been offered in evidence and is a letter dated June 16, 1928, and written to one of Merchants' prospective customers, the Chicago Jewelers Tool Works at Chicago, Illinois:

> "Under Pennsylvania Railroad tariffs now in effect, carload shipments properly billed for delivery to us are entitled to 48 hours free storage, not including day of arrival, Sundays or legal holidays. Therefore any portion of your carload ship-

ments delivered within the free period would be handled by us without expense to you."

That means that the Merchants Warehouse Company will unload the car, sort it as to brands and markings, of course, providing the labor to perform that service, check it, subsequently deliver it to the tailboard of a truck or put it into a car, load it into a car for reshipment, without any expense. We, of course, cannot do that, because the Merchants Warehouse Company is paid for performing that service by the Pennsylvania Railroad allowance, which the Pennsylvania Railroad makes to them, allowing them to perform that service free of charge. We cannot do it.

The attention of the witness was called to the following excerpts from Plaintiff's Exhibit No. 8, which was a letter dated June 22, 1928, from Merchants Warehouse Company to George Steere & Sons:

"There would be no charge on orders filed with us before the car is unloaded, and hauled by your customers within 48 hours after the arrival of the car. If not hauled within 48 hours the regular storage and labor rates would apply.

"Our warehouse is served by the Pennsylvania Railroad, enabling us to receive carload lots without cartage or switching expense and to make either carload or l. c. l. (less than carload) shipments without cartage or handling expense."

Witness stated that the Terminal Warehouse Company could not meet the offer contained in that letter. Terminal Warehouse Company can make less than carload shipments without cartage expense but cannot do it without handling charge.

I have constantly met such offers as have just been read to me in competition in an effort to get business for my company. When I was soliciting business, as a matter of fact, I was informed that unless we could

afford free storage and free handling charges we could not get their business. Everywhere that I went I was confronted with that offer of free storage and free handling service. The effect upon our effort to get business was that we either had to lower the normal warehouse tariff storage and handling rate to get the business or else we had to forego it altogether because the costs of handling which we would have to assume would be prohibitive. I have and produce letters from my customers in connection with a refusal to do business, or taking business away or something of that sort.

By Mr White:

Q. You have produced a letter addressed to you from the Northwestern Consolidated Milling Company, a customer, dated June 15, 1928, which has been marked for identification as Exhibit No. 15, and which I now offer in evidence.

Mr. McCracken: I object to the offer. I contend that we are entitled to cross-examine the witness who wrote that letter.

The Court: The offer is premature. You cannot offer it until after cross-examination.

Mr. McCracken: I am entitled to cross-examine the writer of this letter as to his real reason.

The Court: The offer is premature. If the objection is made on that ground, I will sustain it.

Mr. McCracken: No, the objection is on the ground that it is a statement from a third party whom we have no opportunity to cross-examine.

The Court: I will overrule the objection and admit the letter for the purpose of showing that prospective customers or patrons of the plaintiff company gave that reason for not dealing with them.

(Exception noted for defendants.)

MR. WHITE: I will read the letter, Exhibit No. 15, to the jury, as follows:

"June 15, 1928.

Terminal Warehouse Co.,
Delaware & Fairmount Ave.,
Philadelphia, Pa.

Gentlemen:

Until such time that you can extend free handling to us on that portion of the car that is delivered within 48 hours of the receipt of car at your warehouse, we will be unable to give you any consideration for Philadelphia distribution.

Yours very truly,

THE NORTHWESTERN CONSOLIDATED MILLING CO.,

D. W. M."

By MR. WHITE:

Q. What did the Northwestern Consolidated Milling Company deal in?

A. Flour.

Q. Have you any other letters of a similar nature?

(Witness produces letter to Mr. White.)

MR. WHITE: I offer in evidence letter dated February 10, 1928, by A. E. Turner and Company, addressed to the Terminal Warehouse Company, Delaware Avenue and Brown Street, Philadelphia, Pennsylvania.

MR. MCCRACKEN: This is objected to for the reasons previously stated.

THE COURT: The objection is overruled and the letter admitted for the purpose heretofore stated on the record by the Court.

(Exception noted for defendants.)

MR. WHITE: I will now read to the jury Plaintiff's Exhibit No. 16, as follows:

"A. E. TURNER & COMPANY
135 South Second Street, Philadelphia

February 10, 1928.

Terminal Warehouse Company,
Delaware Ave. and Brown St.
Philadelphia, Penna.

ATTENTION: Mr. W. J. McLaughlin

Dear Mr. McLaughlin:

We have just had to wire our shipper to change the destination on a car of canned goods owing to the fact that you cannot extend to us the forty-eight hours free storage, so that we can make some deliveries.

We would like very much to favor you with at least a portion of our business, if not a great deal of it, but you can appreciate we cannot afford to do so under the circumstances. The shipments that come forward to us are all pool cars, some of the buyers take immediate delivery of their merchandise, others permit it to remain on storage. Those taking delivery naturally will not pay any charges at your warehouse that they do not have to pay at other Terminals in the city.

A few of our up-town buyers have expressed preference for delivery at your warehouse, but this is impossible under the present conditions.

Very truly yours,

A. E. TURNER AND COMPANY
Turner."

A. E. Turner and Company are canned food brokers. We occasionally got a carload from them

prior to that time, but very rarely. Their Philadelphia address is 135 South Second Street. They are brokers in canned goods. They do not manufacture the merchandise. It comes from canneries located at various points.

MR. MCCRACKEN: I desire at this time to note also an objection to the offering of these letters. Neither one of these letters contains a single word about the Merchants Warehouse Company. It may be, and your Honor knows that it was the case, that other warehouse companies in Philadelphia had similar contracts with other railroads, to which this letter may have been directed at the time, so that this letter, even if admissible under your Honor's ruling, unless it refers definitely to the Merchants Warehouse Company, it certainly cannot be held to be indicative of any damage which they may have done.

THE COURT: That objection may be noted on the record, and the ruling applies to that objection, as well as to the one previously made.

(Exception noted for defendants.)

The words "The shipments that come forward to us are all pool cars" means that they have the contents of that car sold prior to its arrival at the warehouse, that is intended for immediate distribution within that so-called forty-eight-hour free handling charge. The word "pool" indicates that several parties are interested in the car—a number of different consignees.

By MR. WHITE:

Q. Have you any other letters of a like character?

MR. WHITE: Witness produces a letter dated June 22, 1925, from the Bon Ami Company, No. 17 Battery Place, New York City, addressed to the Terminal Warehouse, Philadelphia, Pennsylvania, which has been marked Plaintiff's Exhibit No. 17, which I now offer in evidence.

MR. MCCRACKEN: This is objected to for the reasons heretofore stated, and also for the additional reason that it bears a date one year before the period named in this suit.

MR. WHITE: I do not think that is a valid objection. The conspiracy went back before the date of the suit. The letter indicates that business would be withheld even after the period began.

THE COURT: I will admit it and limit it to the complaint that the customer would deal with the warehousing company where he had the privilege of delivery direct to the jobbers, as called for.

(Exception noted for defendants.)

THE COURT: There will also be an exception noted for the plaintiff, if they desire, if you wish to present it for a further purpose. I think it is only admissible to show that the patrons of the warehouse were affected in bestowing their patronage by the fact whether or not deliveries could be made by the warehouse directly to the jobber.

MR. WHITE: That could be done by any warehouse.

MR. BARNES: I make the further objection that the letter makes no reference to the Pennsylvania Railroad. The other railroads in the City of Philadelphia had the same kind of arrangements in regard to free storage and free service, so that this letter in no way has any effect upon the Pennsylvania Railroad, one of the defendants.

(Here ensued a discussion off the record, by direction of the Court.)

THE COURT: To make it clear, and the jury are so instructed, that letter is limited to the expression of the one thought, that there is an ad-

vantage in making shipments to a warehouse company and have that company make distribution to jobbers in less than carload lots.

(Exception noted for defendants.)

MR. WHITE: I will now read to the jury Plaintiff's Exhibit No. 17, as follows:

"THE BON AMI COMPANY, INC.

17 Battery Place, New York, June 22, 1925.
Terminal Warehouse,
Philadelphia, Penna.
Gentlemen:
For sometime past we have been carrying a small stock at the Merchants Warehouse as well as supplying the trade from your warehouse. We have also been shipping cars consigned to our broker care of the Merchants Warehouse and the contents of these cars have been delivered direct to the jobbers as they called.

In this way we have saved quite some storage and handling, and we feel that we should discontinue carrying two warehouse stocks. This is the reason why we have permitted your stock to run down so low as it has. It is our intention to clean it up as soon as possible and not replenish same.

We regret very much that we find it necessary to sever our pleasant relations with you, but feel that it is to our advantage to do this.

With kindest personal regards, we are,

Very truly yours,

THE BON AMI COMPANY
J. A. Guerlin,
Traffic Manager."

In answer to the question whether or not we were able to meet the objection which we met with in our

solicitation of business—that we could not furnish this free distribution within forty-eight hours and free reshipment—I state that on the heavy density commodities such as hay, grain and feed and flour and canned goods, we were absolutely shut off from handling it because we could not afford to absorb the loss. The difference between that kind of business and the other kind of package freight is that it necessarily costs considerably more to handle a carload of heavy density products than the light density products. As a rule, heavy density products, such as flour, usually move out in such great quantities in the first forty-eight-hour period, we could not afford to absorb the cost of handling and sorting and delivery of that within the forty-eight-hour free period. Heavy density means that it is low in volume, it is very heavy in proportion to its size, such as barrels of flour, bags of cement, bags of sugar, bags of beans. The cost of handling that freight is so great that we could not do it free within forty-eight hours under any conditions, nor could we reship it free. The cost is too great.

In order to meet this competition with regard to lighter forms of package freight, we had to reduce our normal warehouse charges to offset or equalize the offer of the free service and free handling and free storage within that period, so that the customer would not be penalized. Otherwise we would not be able to get any business. Regarding the value of heavy density business to a warehouse, as compared with other business, heavy density business is the most desirable warehouse freight that could be handled. It moves in far greater volume than the lighter density commodities. There is a very large volume of it in Philadelphia. For instance, I understand that there is approximately two million barrels of flour a year alone handled in Philadelphia.

Q. You say you shrank your charges below your regular and normal tariffs for the lighter business?

A. Yes, sir.

Q. Are you prepared to give an estimate for the benefit of the Court and jury as to the amount of loss you sustained by reason of the fact you received less for business moving in through your warehouse during the period covered by this suit, than the fair and normal rate covered by your ordinary tariffs?

A. Yes.

Q. In order to support the estimate which you have in mind, what did you do?

A. I prepared a statement of all the tonnage, carload tonnage, received by us during this period, and on that statement I have indicated the date of arrival of the car at our warehouse, the car initials and number, the point of origin, the name of the commodity, weight of consignment, the contract rate, or the rate at which we were forced to take this business at, and the normal rate that we would have obtained had it not been for the terminal allowance, and the difference in dollars and cents,—listed in dollars and cents.

Q. In what form did you make up that statement? You made up a schedule or table in five volumes, dealing with every shipment that went through your warehouse in this period?

A. Every shipment of package freight that we had sufficient available data on. There were some shipments in which our records were lost or mislaid which I did not incorporate in that statement. Nor did I incorporate in that statement the tonnage on certain accounts on which we did receive the normal charge.

Q. You have included here only that part of the tonnage on which you shrank your rate and on which you considered your records were clear?

A. Yes, sir.

Q. Based on this record and this investigation, what was the loss you sustained during the period covered by this suit, by reason of the fact that you were compelled by the competition which has been described from the Merchants Warehouse Company to shrink your charges below the fair and normal rates, as shown by your ordinary tariffs?

MR. BARNES: Note my objection——

MR. MCCRACKEN: I object to it and I would like to state my reasons. First, because of its mere statement,—it starts out with a premise of what this man terms a normal rate, which is an arbitrary figure, not established by any evidence in this case. Then it goes on to a shrunken rate, which again is an arbitrary figure, not established as a necessity. Secondly, because it does not appear that a single carload which was thus handled, would have been lost, or the business lost, had the lower rate not been charged. Third, because it is secondary evidence, the shippers themselves being the proper witnesses to prove that they would not have given their business to this warehouse. Fourth, it does not appear in this case that the Merchants Warehouse Company is the only warehouse company handling freight with so-called allowances. Fifth, because one of the defendants is the Pennsylvania Railroad, and under no circumstances could the Pennsylvania Railroad be made liable for payment of any loss which this man suffered for goods shipped by other railroads, of which there are two in Philadelphia.

MR. BARNES: It is really the conclusion of the witness from an examination made of his own company's books, which is self-serving in character. It amounts to no more than an opinion as to the information contained in this compilation.

THE COURT: I will sustain the objection on the ground that the witness would be substituting himself for the jury. I will permit you to show the facts upon which the witness would base the conclusion that he is expected to state in answer to this question. But the jury may draw that conclusion, and not the witness.

(Exception noted for plaintiff.)

(Here ensues discussion off the record by direction of the Court.)

THE COURT: I will permit the witness to state the receipt from this business, without complication of this element, and to state how much was actually received from it. He may show the amount of his loss as far as he is able to do it. For how much of that loss you are responsible, and for how much somebody else is responsible, is an entirely different question.

(Here ensues discussion off the record by direction of the Court.)

THE COURT: I will permit this amended restatement of the offer which has been before ruled upon, and for the purpose outlined in that amended statement, I will admit the evidence and give the defendants an exception, limiting it, by instruction to the jury, as to its real value, whether it has any value, and if so what value.

(Exception noted for defendants.)

By MR. WHITE:

Q. Mr. Sullivan, confining your answer to the business that you actually took, that went through your warehouse, as to which you had accurate information and records in your warehouse, what was the difference between the fair, normal or regular tariff price and the price you had to accept on that business?

MR. BARNES: That is objected to.

THE COURT: In that form I think the question is objectionable. Why not show what the business was, which might have been obtained under certain conditions, and if done under those conditions, and what the amount received by the plaintiff was under the imposed conditions.

By MR. WHITE:

Q. What was the difference between the amount which you did receive under the conditions——

THE COURT: The trouble with that is that gives the witness the functions of the jury. He may state the contrast, and the jury can draw the inference as to the difference.

By MR. WHITE:

Q. Have you figures before you, from which you can give us the amount which you received on the business which you have described, limiting it as I have indicated?

MR. MCCRACKEN: We object to that.

THE COURT: Objection overruled.

(Exception noted for defendants.)

A. I do not have the exact figure, Mr. White. All I can do is to give you an average figure of our revenue derived from the storage and handling of package freight during this period, the average per year.

MR. MCCRACKEN: I object to that.

By MR. WHITE:

Q. Can you produce the figures without looking over that schedule?

A. No, sir; I can not.

THE COURT: You might go on with some other feature of your case. We will permit you to recall this witness later on, on this phase.

By Mr. White:

Q. Now, Mr. Sullivan, you have not attempted, as I understand you, to mention any figures as indicating your loss on account of the business you did not get?

A. No, sir; I did not feel that I had sufficient information to make an estimate of that loss, Mr. White.

Q. You are not undertaking to name any figure as a loss sustained by reason of either the heavy density business that you did not get, and which you say you were completely shut out from, or any other business which you were unable to take on?

A. No, sir.

Q. What about the business that you lost in competition to the Merchants Warehouse Company? Was there such?

A. Yes, sir; however, there is no item of damage on that. I didn't feel that I had sufficient information to estimate a loss in dollars and cents.

I called on officials of the Pennsylvania Railroad Company repeatedly in an effort to get them to stop paying this allowance. I have dates and names. On May 26, 1925, I discussed the matter with Mr. W. L. Willis, division freight agent at that time. I pointed out to him how the payment of this allowance was ruining our business, enabling the Merchants Warehouse Company to take the business away from us, shutting us away or off from business that we had a normal right to maintain. In my interview with him I obtained no promise of relief because he always referred to the contracts in existence between the Merchants Warehouse Company and the Pennsylvania Railroad, that they would have to continue to pay the allowances. That was before this period began.

On October 13, 1925, I called on Mr. J. B. Large. He is general traffic manager now. I don't know what his particular title was at that time. I discussed the same thing with him, begging him to stop the payment

of this allowance to the Merchants Warehouse Company so that our business would not be ruined. He stated that there was only one way that they could stop paying the allowance and that was by order of the Interstate Commerce Commission. Nothing was done as a result of my interview.

On May 10, 1926, I called on Mr. C. B. Sudborough, the assistant vice-president. Practically the same conversation took place. The loss of business, the shrinkage of our charges was getting so pronounced that I was very persistent in my request to the official, Mr. Sudborough, that these allowances be discontinued as they were ruining our business. He, of course, reverted to the usual answer, that they had a contract with the Merchants Warehouse Company and they would have to continue to pay it.

I saw Mr. George Ogden and Mr. J. L. Eysmans, but I do not have the record of the exact date at which I discussed this. Mr. Eysmans is vice-president, and I think Mr. Ogden was general freight agent at that time. I was present at a meeting of the Association of Manufacturers' Representatives with representatives of the three railroads, the B. & O., the Pennsylvania, and the Reading Railroad. The same effort was made there, but without success.

CROSS-EXAMINATION.

By MR. BARNES:

Terminal Warehouse Company began business in 1904. It was incorporated in 1921. Its present directors are Mr. F. J. Sweeney, secretary and treasurer, W. W. Sullivan, superintendent, L. T. Howe, vice-president, William C. Harter, president of the Northern Trust Company, J. Malcolm Johnson, assistant vice-president of the Girard Trust Company, Mrs. Thomas D. Sullivan, and myself.

I began my relation with the company as solicitor for business in Philadelphia and outside Philadelphia as far west as St. Louis, and, of course, down to Boston. Wherever a prospect for business arose I went there to get it. I did various other things in addition to that. That was my principal business. I called on prospective shippers and pointed out the advantages of shipping to my warehouse over the Reading and Pennsylvania Railroads. I was not concerned over which one they shipped. In addition to myself, we had in our company solicitors for business who went about hunting business.

Q. Did you hand them these circulars and things or show them to them, the ones that you produced here today?

A. They are not the circulars of the Terminal Warehouse Company.

Q. It is a subsidiary—it takes business to that warehouse——

A. To the Terminal Commerce Building.

Q. Are you soliciting for them as well?

A. Soliciting a different type of business. That business up there was not a warehouse business. It was a combination sales space, office space, individual tenant occupancy but not a public warehouse business.

Q. Explain to me what you meant by this circular —I don't know the date of it, eliminating the expense of hauling to and from the freight station.

A. That is the freight of the tenants of the building.

Q. Don't you have some circulars out for the Terminal Warehouse Company?

A. Yes, sir.

Q. Where are they?

A. I haven't got one with me.

Q. In this book, entitled "Warehouse Facilities of the Pennsylvania System," Plaintiff's Exhibit No.

3, there is a reference to the Terminal Warehouse Company at Baltimore. Is that one of your subsidiaries?

A. No, sir; it has no connection with our company.

Q. I notice in that there is some provision as to absorbing the charges as to that company.

A. I didn't think it read exactly that way.

The advertisement appearing on page 138 of the paper called "Distribution and Warehousing," and the advertisement contained on page 6 of the paper called "Distribution News" are advertisements of our company. The phrase "No cartage expense on l. c. l. shipments from the warehouse" appearing in said advertisement means that if the shipment comprised a number of less than carload lots there would be no charge to the transfer point of the Pennsylvania Railroad or the Reading Railroad.

The contract that has been referred to (Plaintiff's Exhibit No. 14) states and recites therein that the side tracks are on the property of the Terminal Warehouse Company, and these side tracks referred to in this contract are the side tracks that are on our property.

When I had these interviews which I described at the offices of the Pennsylvania Railroad Company during 1925 and 1926, the railroad was bound by contracts which it had to observe.

Q. You said there was a meeting at that time with representatives of the Pennsylvania Railroad, the Reading and the B. & O. Why were the other two involved in that conference? Why were the Reading and the B. & O. representatives involved in that conference about the warehousing in Philadelphia? The Reading and the B. & O. also were making those allowances, were they?

A. Oh, not in the same measure.

Q. Yes, but they were doing it?

A. Well, yes.

Q. Not in the same measure, I understand.

A. The rate of allowance by the Reading to other warehouses was considerably lower than the allowance the Pennsylvania Railroad was making to the Merchants Warehouse.

Q. But they were paying, were they not, they were paying allowances?

A. To the best of my knowledge and belief.

Q. Weren't you complaining of that fact?

A. The Association of Manufacturers' Representatives were the ones that were complaining.

Q. Then the reason they were there, I understand, they had similar contracts for making allowances, whatever the amount may have been, to other warehouses?

A. They made allowances to these other warehouses, but, as I understand it, they were different from that of the Pennsylvania Railroad.

Q. I understand they were different, but they had similar contracts?

A. Yes, sir. I have never seen the contract, Mr. Barnes.

Q. But you were complaining of the contract?

A. I didn't make the complaint. This was a meeting of the Association of Manufacturers' Representatives.

Q. They were making the complaint?

A. They were the ones that were making the complaint.

Q. They were making the same kind of a complaint?

A. Yes, sir.

Q. Now, then, did you or did you not get business from the Reading or your warehouse as well as from the Pennsylvania?

A. Yes, sir.

Q. And from the B. & O.?

A. Well——

Q. You got some business from the B. & O.?

A. There is none on that statement.

Q. That does not answer my question.

A. There may have been a few B. & O. shipments. At this conference I think there was one other representative of a Philadelphia warehouse besides myself; I was just an invited guest. This was a meeting of the association known as the Association of Manufacturers' Representatives. That group consisted of sales representatives of out-of-town manufacturers and they wanted that free loading and unloading privilege extended to the other warehouses. As I recall it, there was the Terminal Warehouse and, I believe, one other warehouse involved in this discussion.

Q. Mr. Sullivan, you were a witness in the proceeding before the Interstate Commerce Commission, were you not?

A. Yes, sir.

Q. And certain complaints were filed in that proceeding by your company against the other railroads as well, is that correct?

A. Yes, sir.

Q. That is to say, there was a complaint filed against the Reading Company alleging the same practice that you allege against the Pennsylvania Railroad Company in regard to shipments from Philadelphia?

A. Yes, sir.

Q. And there was likewise a complaint made by your company before the Interstate Commerce Commission in reference to the same kind of practice against the B. & O. Railroad Company?

A. Not the same, Mr. Barnes.

Q. What were the differences?

A. The difference was the amount of allowance and the other concessions that the Pennsylvania——

Q. I am not talking about the amount; I am talking about the thing that you complained of, and you say the complaint was against the other two railroads as well as against the Pennsylvania, the same practice that you complained of against the Pennsylvania Railroad Company?

A. Yes, sir.

MR. BARNES: That's all.

By MR. MCCRACKEN:

Our business started in 1904. I was not there then. I am not familiar with the number of buildings that they started with. They certainly did not start with the entire modern equipment that they have at present. Terminal Warehouse Company went on doing business under some firm, partnership or individual from 1904 until they incorporated in 1921. I went with the company in 1918 and my knowledge of its business goes back to 1918.

In 1918 my company owned all the warehouses that I mentioned this morning except two—the Brown Street building and the sales building. We built one section of the Brown Street building in about 1921 or 1922, around in there, and the second section a few years after that. The sales building was built about 1926. No building has been built by our company since 1926. There has been no building at all since then. Our space has not increased since then.

Q. Your business has, however, grown, since 1926?

A. Since 1926 it has gone down.

Q. Did it go down constantly from 1926 on?

A. Well, I haven't the figures here, but it went down constantly, I would say, from 1926 on. There might have been some few variations.

Q. Isn't it a fact that it went up from 1926 to 1927, and from 1927 to 1928, and from 1928 to 1929, and began to recede when the depression came on, after 1929; isn't that the fact?

A. Are you talking of our entire operations or just the package freight business?

Q. I am talking of your entire business.

A. The entire business, Mr. McCracken, I am speaking from recollection, taking our business as a whole, I would say it was about comparable in 1926, 1927 and 1928; there might have been a little variation one way or another, and possibly, also, in 1929, and from then on it started to go down.

I attribute the decrease in our package freight business to the Merchants Warehouse; and the decrease in the business in the years prior thereto continued also in 1931 and 1932. I wouldn't say 1933 because the nefarious practices were stopped in 1933. In other words, there was an elimination of the cutting in rates which was indulged in prior to that. As a result of this proceeding before the Interstate Commerce Commission against not only the Merchants Warehouse Company and the Pennsylvania Railroad, but other warehouses, under the ruling the Court handed down this was stopped; and that was affirmed by the Supreme Court in May.

After that every warehouse in Philadelphia was on an equal basis so far as this allowance was concerned. Our business did not go up immediately after that because the free unloading and free storage for the forty-eight hours was continued thereafter by the Merchants Warehouse Company. They were not being paid for it, but we have a letter, a copy of a letter, that Mr. Harvey Miller sent out to the trade. He was prepared to give his customers that service even though he paid for it himself. I don't know about a letter of a similar nature sent out by the Pennsyl-

vania Warehousing and Safe Deposit Company just before, but I know there was an advertisement. In any event they did continue that allowance.

During this period that we are talking about there were other warehouses in Philadelphia besides our warehouse and the Merchants. Altogether there are about ten, I would say ten different organizations. I guess there are a lot more than that. I know the Bailey Warehouse. Bredt's Warehouse is really a trucking operation; it runs a warehouse that is so small that it is insignificant. I never heard of the Commonwealth Warehouse and Storage Company. Pier 84 South is the Luckenbach Company. I know the Commercial Warehouse Company. The Equitable Warehouse only provides storage facilities for Libby, McNeal & Libby. The Fenton Storage Company is practically wholly a furniture warehouse. I know the Gallagher Warehouse—there are several of them. I don't believe the General Warehouse Company was in business during that period. I know Godley's Storage Warehouse. Guaranty Industrial Warehouse wasn't a warehouse, it was a loft building. Miller North Broad is a furniture warehouse. We handle furniture. I know the Northeastern Warehouse Company. I know that the Pennsylvania Warehousing and Safe Deposit Company has ten or eleven warehouses. I know the Philadelphia Tidewater Terminal. The Philadelphia Wool Scouring & Carb. Company is a wool scouring plant. Rex and Company is a warehouse.

All of these warehouses, excepting those which I referred to, and which store private products, are in competition with us. None of these warehouses got any of the allowances that we are complaining of. In other words, we get business from some of these other warehouses and we lose business to some of these others from time to time. In other words, the ware-

house business was a large business during this entire period.

When our company came into the field in 1904, although I wasn't there I do know that the Merchants Warehouse Company was then in existence and had been for about twenty years. I was before the Interstate Commerce Commission and heard all that was discussed there, but I do not recall anything with respect to renewal contracts. I heard that Merchants Warehouse Company had received contracts; I know there were contracts existing; the same kind of contracts as far back as 1918. I know that the other contracts were existing long before that from general knowledge. I don't know how many warehouses were in existence at the time my company came into the field in 1904. At least there was the Merchants Warehouse Company and the Pennsylvania Warehousing and Safe Deposit Company, dating back many many years before. I do not know to what percentage of the warehouse business in Philadelphia my company built itself up to between 1904 and 1932. I have no knowledge of what business the other warehouses did. I would certainly be surprised to learn that we did twenty-three per cent. of the business in Philadelphia during this period, with eight or ten warehouse systems to compete with. The only thing I can refer to is that we had one million square feet of space when I came to the company in 1918.

In that advertisement appearing in the magazine "Distribution and Warehousing," we advertise that we have sixty-eight acres of floor space. There is 43,560 feet to an acre. Our company does not have that sixty-eight acres. That includes the space that we have in the Terminal Commerce Building at Broad and Callowhill. The Terminal Commerce Building is a wholly owned subsidiary, so that Terminal Warehouse plus Terminal Commerce Building, which it owns, has

a floor space of sixty-eight acres, or a total of 2,942,000 square feet. In other words, it is nearly three million square feet. That is floor space and ground storage space. That compares with the 1,300,000 square feet of Merchants Warehouse Company. There is quite a distinction in that space. It is not warehouse space. The biggest bulk referred to in this advertisement is not warehouse space. The advertisement says floor space.

Q. Did you advertise any business except a warehouse business?

A. The Terminal Commerce Building does.

Q. What does it advertise?

A. It leases show room space, business space——

Q. It all belongs to you and you get rent for it?

A. It don't belong to me.

Q. I mean to the Terminal Warehouse Company.

A. Yes; but it couldn't all be termed warehouse space.

Terminal Commerce Building is owned 100 per cent. by us. That building was completed about July 1931. That building has an enormous amount of space in which most of the automobiles which are shipped into Philadelphia are stored. In late years, the automobile business hasn't been very fruitful. Back in these other years it was the only thing that kept us alive, because the Pennsylvania Railroad did not have a warehouse for automobiles. We got the largest percentage of the automobile business.

Q. As a matter of fact, in that same warehouse, you had an enormous news print business?

A. Mr. McCracken, this is not a warehouse; it is the Commerce Building.

Q. Whatever it is. You stored there. You have the *Public Ledger* account, do you not?

A. No, sir.

Q. Do you have the *Bulletin* account?

A. No, sir.

Q. But you have a news print business of some kind?

A. They did have for a few months; stored a little paper for the *Record,* that is all; just a few cars, but we have nothing to do with the *Ledger* or the *Bulletin.*

Q. Where do you store this news print?

A. We don't store it today. I think previously they stored it in our Brown Street building.

Q. What account was that?

A. The *Public Ledger.*

Q. How long did you have that account?

A. About seven years, six or seven years.

Q. When did you lose it?

A. I think it was in the fall of 1931 or the first part of 1932.

Q. That was after this decision came through?

A. Yes, sir.

Q. That was a business of large density, large, dense rolls of paper?

A. Yes, sir.

Q. You were able to carry your *Public Ledger* account for a period of seven years?

A. We felt that the decision would come out before it did.

Q. You carried that account seven years before starting such proceedings? The case didn't last seven years.

A. I think it was 1927 or 1928 we started it.

Q. You say you had it for seven years prior to 1932 which would carry it back to 1924-1925?

A. It was about 1926.

All of our buildings with railroad sidings are served by both the Pennsylvania and the Reading, with the one exception that I referred to. That exception is with the Reading. I don't know what percentage of all

our traffic comes in over the Pennsylvania and what percentage comes in over the Reading. I would have to verify it, but I imagine that 60 per cent. of the traffic that comes into our warehouse comes over the Reading —it is pretty nearly that percentage. The Reading Railroad traffic is slightly more, as I recall it, slightly more than what the Pennsylvania Railroad traffic amounts to. In other words, the articles that we complain of here for which we say we got less than we should have gotten for these articles, more than one-half come in over the Reading.

Q. Now, Mr. Sullivan, you spoke of a normal rate for warehouse service. There is no such thing as a published tariff for warehouse service, is there?

A. Oh, yes; there are figures.

Q. By whom?

A. (N. B.—The witness gave as an answer proper names, which the court stenographer took down in stenographic outline but could not later decipher. His notes are now lost.)

Q. I am speaking of a tariff instituted by some authority.

A. Yes; in certain States, the Public Service Commission of the State fixes the tariff.

Q. Not in Philadelphia?

A. Not in Pennsylvania.

Q. Therefore, when you speak of a normal rate, what you are speaking of, I suppose, is the average rate that all warehouses of a similar type of construction charge?

A. The normal rate is the rate which is predicated upon the cost of the service.

Q. Then, the normal rate is the rate that you think you ought to get, not the rate that the general warehouse does get?

A. The rate we know we have to get in order to pay for the cost of the service.

Q. Although, as a matter of fact, that rate isn't gotten in many instances by warehouses throughout the State?

A. I can't answer for other warehouses, but I know we didn't get it.

Q. Were you kept advised of competitive rates with other warehouses?

A. Yes, sir.

Q. The rate is made, isn't it, by competition?

A. The rate here in Philadelphia was fixed by the Merchants Warehouse Company. They were the ones that got those allowances and had those privileges, which enabled them to establish the rate and everybody else in Philadelphia had to meet that rate.

Q. You mean by that that the Merchants Warehouse cut prices?

A. I certainly do.

Q. Can you give us one single instance?

A. Yes, sir; the Corn Products Refining Company. Mr. Harvey Miller went into the office of the Corn Products Refining Company in New York and offered to take the business at one-half the rates we were then charging, and as a result of that visit we received a letter from the traffic manager asking us to eliminate the handling charges and give the first forty-eight-hour period free service.

A. We cut our rates exactly in half, Mr. McCracken, to retain the business.

Q. You cut your rates?

A. We had to cut our rates to retain the business.

Q. What kind of a rate had you fixed before you cut it in half? Did you fix that rate in competition with somebody else?

A. We didn't make that rate in competition with anybody else. We gave them a rate and they accepted it.

Q. As a matter of fact, didn't you originally take that account away from the Pennsylvania Warehouse & Safe Deposit Company?

A. I wasn't aware, at the time we got that account, where they were storing. It was during the period there was quite a congestion of cars in Philadelphia, and we accepted this account as a favor to Corn Products Company. That is how it started.

Q. You found out afterwards they had been customers of the Pennsylvania Warehouse & Safe Deposit Company?

A. In the bulk goods they were.

Q. Now, as a matter of fact, Mr. Sullivan, is this true, that wherever you can keep a customer on what you call your normal rates or better, you do it?

A. Yes, sir.

Q. You don't cut rates generally, do you?

A. No, sir.

Q. You cut rates with respect to each particular customer as the occasion arises?

A. That is correct.

Q. Like any other business. In other words, if you have a customer who complains of your rate, and you find that you have to cut his rate, you don't go to your next customer and say, "Well, I cut so and so's rate and I am going to cut yours"?

A. No, sir.

Q. Isn't it a fact that you have almost as many rates for storage as you have customers depending on the arrangement you make with each one?

A. Not today.

Q. During that period?

A. No; I wouldn't say it was that bad.

Q. Possibly not that bad, but you have a great many different rates among the different customers; is that right?

A. No; there were different figures, of course, but on certain commodities, there was more or less of a standardization. In other words, we always attempted to get our normal warehouse charges. In some cases, in order to offset this allowance of the Merchants Warehouse, we had to reduce our rate 10 per cent.; in other cases 20 per cent.; in other cases 30 per cent.

Q. Sometimes not at all?

A. Sometimes not at all; that is true.

Q. The same thing is true with the space which you rent by the year?

A. Yes, sir.

Q. And sometimes you have been able to rent that space out at one price to one customer, and to another customer at another price, depending on the type of service?

A. Yes, sir.

Coming down to the question of service, I stated that one of the things we encountered was that on the package freight unloaded at the Merchants Warehouse Company it might stay there for forty-eight hours without any charge to the customer.

Q. Do you happen to know that in a vast number of instances, that freight had to be taken up to another floor and stored there for perhaps half of the forty-eight hours and brought down again; do you know that?

A. No, sir.

Q. You don't know that?

A. No, sir.

Q. That would have made a difference, wouldn't it?

A. It wouldn't make any difference to the customer.

Q. But it made a difference to the warehouse company, because they had the same handling charge to pay?

A. Oh, they were all set for that, by the payment of the Pennsylvania Railroad Company.

The contracts between the Merchants Warehouse and the Pennsylvania Railroad require the railroad to pay the warehouse 50 cents per ton for that freight which was handled through the warehouse within the forty-eight-hour period. The contracts required the railroad to pay 50 cents per ton or 35 cents per ton, as the case might be, for unloading the freight whether it stayed there forty-eight hours or forty-eight months. There was a specific payment for the unloading for the service in connection with the unloading, and delivery of the freight within forty-eight hours. That was without regard whether it stayed there forty-eight hours or forty-eight days or forty-eight weeks—they got it. The payment the Merchants Warehouse got wouldn't be exactly for the unloading. They would get 50 cents per ton for every ton of freight that passed through the warehouse in accordance with the tariff provisions of the Pennsylvania Railroad.

The attention of the witness was called to the following language in the contract between the warehouse and the railroad: "To pay to the said Warehouse Company for all services rendered by it in and about the receipt and delivery of freight for account of the Railroad Company, both incoming and outgoing at the said Warehouses the amounts following: Three and one-half cents (3½¢) per barrel for each barrel of flour up to fifty thousand (50,000) barrels per month, two and one-half cents (2½¢) per barrel for each barrel over the said fifty thousand (50,000) barrels per month, and during the first two years of the life of this agreement, forty cents (40¢) per ton (of 2,000 pounds) for each ton of merchandise, and during the following years that the agreement is in force, thirty-five cents (35¢) per ton (of 2,000 pounds) for each ton of merchandise, except that no payment shall be made upon bulk freight

nor upon freight the movement of which by the Railroad Company has been performed at a switching rate, nor upon material and supplies belonging to the Railroad Company."

Witness stated that's what the contract says, but the tariff provision says they are to pay this allowance for all freight passing through the warehouse.

It is a fact that every railroad station allows a consignee forty-eight hours free time within which to take away merchandise without the payment of demurrage and without the payment of anything. There is a marked difference between the privilege afforded customers by the warehouse and by the Pennsylvania or Reading Railroads, in that at a freight station they must unload the car in its entirety, whereas in the warehouse they can unload the car and partial distribution can be made to fifteen or twenty consignees, and the railroads couldn't do that. Every man has the right to let his goods remain at a railroad station for forty-eight hours without having to pay for it.

In many instances, goods come into our warehouses from many cities all over the United States and we take the goods in for perhaps a short time and then reship them by another railroad to the other destinations. Very frequently our reshipment is outside the State and sometimes it is on a new bill of lading. When a carload of freight comes into our warehouse, let us say from Chicago, the first thing we do is to break the seal. It comes to rest in our warehouse and it stays there until we do something to it. We either store it for some weeks or months, so long as the customer wants, or we truck it out or we reship it on a railroad, or we give it to the customer direct. In this way our duties are performed entirely in the City of Philadelphia. This is also true of the Merchants Warehouse Company. We all perform the same type of warehouse service.

Q. Once again I am going to return to your books, and ask you one more question about them. You told us this morning that a great deal of your merchandise came to you—and, of course, by "you" I mean the Terminal Warehouse Company—by truck?

A Not a great deal, but some portion of our business came to us by truck.

Q. Any figures in those books as to the merchandise that came to you by truck?

A. In Volume 5, there is a certain amount that came by truck from railroad stations to our warehouse, Mr. McCracken—yes.

Q. Anything else?

A. Steamship lines; I think through a few steamship lines, but in the main they came from the Pennsylvania Railroad or the Reading Railroad, in the main.

Q. The figures in these books show not only the business which you received from the Reading Railroad and the Pennsylvania Railroad, but also the B. & O.?

A. No; we have no siding connection with the B. & O.

Q. But you have the Belt Line?

A. We have the direct lines of both the Pennsylvania Railroad and the Reading Railroad. I don't think the Belt Line goes above Vine Street.

Q. And also by truck?

A. Yes, sir.

Q. Now, Mr. Sullivan, you told us a little about the Terminal Commerce Building this morning, which you say is a wholly owned subsidiary of your company, and which you say is not only a warehouse, but also a sales office, a loft building and a freight station, among other things; is that right?

A. I didn't say it was a warehouse. I said it was not, Mr. McCracken, in the strict sense, that we operated it as a package freight warehouse.

In a very nice circular gotten out by the Terminal Commerce Building, Inc., we offer thirty-two acres of warehouse space, but that means a tenant can have a show room and an office and also rent warehouse space in connection with other facilities. Although the circular reads "A modern colossus—four squares north of City Hall—spanning a railroad freight station—a city block of offices and show rooms, and thirty-two acres of warehouse space," the intent back of that, there is a total, I think it is a total of thirty-two acres, which embraces all those facilities. As to how many acres are the offices, how many acres are the show rooms, and how many acres are for warehouse space, well, it all depends upon how much space the tenant leases, that he desires to use for warehouse space, or that he desires to use for office or display space. We could not lease the whole building for warehouse space, if the tenant wanted it, because there is a certain portion of it that is not fitted for warehouse space; that is 350,000 square feet or approximately eight acres. We can't use eight acres out of the thirty-two acres for warehouse space. That doesn't mean we are using it as a public warehouse.

Q. Oh, well, all the way through, in all of your warehouses, they are run to take care of the amount of space that your customers desire?

A. A very small portion.

Q. But you are ready to do it if the customer wants it?

A. Yes.

Q. And that is quite a common practice, is it not?

A. Yes.

Q. Now, the rest of these advertisements all contain references to warehouses, don't they; to warehouse space, and elevator service, all in the Terminal Commerce Building?

A. That's the warehouse space of the tenant, not the warehouse space of the Terminal Commerce Building.

Q. Let us have no confusion about it. It is a fact, according to what you just told this Court and jury that the Terminal Commerce Building at Broad and Spring Garden Streets does contain twenty-four acres, which is used for warehouse space by somebody?

A. No; that particular space is also used for office space.

Q. There are twenty-four acres that can be used for warehouse space if demanded?

A. If demanded by our tenants.

Q. And some of it you lease to tenants by the month or by the year, and some of it you lease as a public warehouse?

A. No; not that warehouse space. That warehouse space is rented in conjunction with showroom space or office space. A great amount of the space is not used for public warehousing; I would say that less than 20,000 square feet out of a million square feet, so you can see how inconsequential it is.

Q. The only difference is that you get paid by the year instead of by the package for the same service?

A. No; there's quite a big difference there.

Q. It is the difference between a furnished house and an unfurnished house. You rent these people an unfurnished house?

A. No; it is the equivalent of the person going out and renting a separate building.

Q. Exactly, but you get a per square foot rental for it as warehouse space?

A. We don't care what it is used for.

Q. They use it to warehouse their merchandise, don't they?

A. Some of them do, and some of them don't.

Q. In other words, it takes that much merchandise out of your warehouse facilities in Philadelphia?

A. No, sir.

The only type of business that is up there in the Terminal Commerce Building is a type of business that is normally handled in a separate building. Take, for instance, the Milton Bradley School Supply Company. The character of merchandise that they carry in stock is such that no public warehouseman could handle it. It requires trained employees that are familiar with the merchandise that the Milton Bradley School Supply Company distributes. They have an office and their own display space. They have their own personnel who put it away and sort it, and properly consolidate it in orders and reship it. The Charles Beck Company is another business of that kind. They distribute paper. They have an office and warehouse space which is manned entirely by their own employees. That paper is what we call "heavy density products," but there is no public warehouse. It is a private warehouse. It is a private warehouse in that sense but the rent belongs to us and the floor space belongs to us—by us I mean the Terminal Commerce Building—and we rent it for a period of a year or longer and they can do anything they want to do within the requirements of that lease. They could play baseball there if they wanted to pay for the broken windows.

Q. As a matter of fact, what they do is to pile their merchandise on the floor until they need it?

A. That's correct, and office space.

The difference that I draw between that kind of business and the business that we do in our Brown Street store—well, our men are in charge of all the space, take in the merchandise, sort it, pile it and get it out when the customer wants it—and all we do there in the Terminal Commerce Building is to supply the space, the same as the Land Title Building supplies

office space to the tenants that want it. We do not have a certain part of this building that we use for a public warehouse. The only storage we do up there is the slight excess storage of merchandise that tenants cannot get into their space. To give you some idea of the smallness of it, we only have one employee working in that department.

The Merrit Unloading Company is a stevedoring company and does not belong to the Terminal Warehouse Company. It was organized by a former employee of Terminal Warehouse Company. It has no connection with the Terminal Warehouse Company.

I told you this morning something about the fact that we cannot take heavy density products and I named hay and feed as two heavy density products. We have no hay warehouse anywhere. We have facilities that are capable of storing hay. We have never devoted those facilities to the storage of hay, grain or feed because we never get it on account of the free unloading service of the Merchants Warehouse. It requires a certain kind of warehouse service. Of course, we could not put it in a stipulated warehouse, but we have a number of non-stipulated warehouses. By a stipulated warehouse I mean a warehouse in which the Underwriters restrict you from putting anything in them that is extrahazardous, and of those commodities that go in a non-stipulated warehouse, hay is one of them. I do not know that you must have certain moisture conditions for hay and feed. Of course, you have to have ventilation or the feed will smolder and catch fire. It is customary of any number of commodities that we store that we have got to allow a passage of air under and around the merchandise.

Q. And you have been saying all along this morning that you can't get this kind of business, or you couldn't get it. You referred, of course, in all of your

testimony to the period in question, between 1926 and 1931, did you?

A. Yes, sir.

Q. Because since the Supreme Court of the United States handed down that decision, you have all been on a par, haven't you?

A. Insofar as the payment of the allowances was concerned—yes. The allowances ceased after the Supreme Court decision.

Q. In other words, you would not be on a par so far as administration, and management, and so on were concerned?

A. During the period they received these allowances, they were able to build up a goodwill that enabled them to give free unloading, which of course we couldn't do. In addition, they still have the advantage of having the entire agencies—the station agents of the Pennsylvania Railroad soliciting business for them. We don't have any railroad employees soliciting business for us.

Q. In other words, you have not been able to make a deal with any railroad?

A. No, I didn't ask them to make a deal. I asked them to please desist paying these allowances to the Merchants Warehouse Company so that our business wouldn't be ruined. I didn't ask them to give us these allowances.

Q. And yet, despite the fact that they had these tremendous advantages and the good will, your company grew to the proportions that you have just described during that period?

A. We had other services that were not subjected to this severe competition. For instance, the Pennsylvania Railroad never paid allowances on automobiles and, as a result, we are able to get that business.

Q. You captured most of it?

A. Yes; we worked very hard to get it. We had to get something like that in order to exist.

Q. And you got it?

A. Yes.

Q. Practically all of the automobile storage business in Philadelphia?

A. Practically all of the automobile storage business in Philadelphia; yes.

Q. Where do you carry that?

A. At the Terminal Commerce Building.

Practically all that business is done on a rented space basis. In other words we rent so much space to these automobile agents. There are a few that are carried in what might be called a unit basis, but the automobile business has been practically nil since then. There has been no surplus of cars carried in Philadelphia so you might practically say there has been no automobile business for about three years. It is not picking up as yet. I see that General Motors are selling a great many cars but they are not stored. They are shipped and delivered immediately to the consumer.

As I recall it, in the suit that I was instrumental in bringing before the Interstate Commerce Commission, it is a fact that in that suit my counsel offered contracts between the Reading Railroad and the Pennsylvania Warehousing and Safe Deposit Company providing for the payment of allowances, and my counsel also offered contracts between the B. & O. Railroad and the Pennsylvania Warehousing and Safe Deposit Company; but not the same basis of allowances that the Pennsylvania—I mean that paid an awful lot less. Take newsprint, the Reading Railroad paid fifteen cents. We objected to the payment of the allowances and we objected, particularly, to the payment of the allowances to the Merchants Warehouse Company because that enabled them to cut rates to the

extent that it was jeopardizing our business. One real objection to it was that in cutting down their rates our rates were cut down.

Q. You didn't mind the Warehousing Company making a little money on the side as long as it didn't hurt you?

A. If they had not used the money to lower the rates for storage, I wouldn't have cared whether they made a lot of money or whether they didn't, but I did object to their using it so that it was jeopardizing our business.

Q. That is the basis of your claim; the amount that you had to cut your rates in order to meet the cut in their rates?

A. That is correct; that is one of them.

Q. Of course, they were not the only ones? I suppose these other so-called subsidized warehouses cut rates?

A. But they didn't make the rates. The Merchants Warehouse made the rates. In other words, they cut the largest amount, and everybody had to go to the same level.

Q. How did you find out what that level was?

A. It was so low sometimes that it was hard to find out what it was.

Q. And during that period that they were doing this cutting that you are complaining of, did the Merchants Warehouse Company's business increase as a result of that cutting?

A. I have no knowledge of the business of the Merchants Warehouse Company other than knowing how much they received in allowances.

Q. Would you be surprised to know that during all the years you are complaining of, 1926 to 1932, the Merchants Warehouse Company had a constantly decreasing business? Would you be surprised to know

that, while you were doing a constantly increasing business? Would you be surprised to know that?

A. I don't believe that our package freight business was constantly increasing during that period.

Q. I am talking about the Merchants Warehouse Company's business.

A. I don't know anything about the Merchants Warehouse Company's business. I don't know what volume of business they did, other than what I am familiar with by reason of the allowances.

Q. What I am getting at is if they did a constantly decreasing business, which you will see in the course of this trial, it wouldn't look as if they were getting business away from you or other companies?

A. Possibly they didn't handle it efficiently and, consequently, lost it.

It is not a fact that, particularly with large customers, the things that tie a man to a warehouse are efficiency, modern type of construction and, most of all, favorable location to his business. The most important factor is the rate or cost of using that particular warehouse or distributing his freight through that particular warehouse. Replying to the question do I mean to say that a man who has his place of business next door or next door but one to a well constructed warehouse would have his goods shipped to another warehouse ten or twenty blocks away for a few cents difference per ton in price, I state that we have had that happen to us, Mr. McCracken, not exactly next door, but contiguous. They used the facilities of the Merchants Warehouse Company. It is not a fact that most of the business we get comes from people who are conveniently located to us. I do not think the commission merchants want storage business. The wholesale grocers are scattered throughout the whole city. I do know that canned goods are one of the types of business we could not get, by reason

of that allowance, and I do know they used that particular building. They may have offices anywhere in Philadelphia. Dock Street is the ancient market place for the produce business in Philadelphia. There are quite a few of the canned goods people on Front Street, quite a few in the neighborhood of the Public Ledger Building. We have two in our building at Broad and Callowhill. They warehouse at Front and Brown, twelve or fourteen blocks away. It does not make any difference how near or how far you are from the warehouse because the warehouse performs all the functions of distribution. The owner of the merchandise or the broker does not have to do that.

Q. If I understand you correctly, convenience of location has nothing whatever to do with the location of the warehouse?

A. That hasn't been a factor; no.

Q. Contiguous usually to his customers?

A. We are all centrally located. For instance, the grocery lines, we were selected as well as the Merchants Warehouse Company was selected as the concentration warehouse of the Associated Grocery Manufacturers of America, in which all food products were to be concentrated, which I think clearly indicates as far as the location facilities are concerned, we are clearly comparable with the Merchants Warehouse Company.

Q. Then you do think location has something to do with it?

A. In some respect, but not with respect to canned goods.

Q. How about efficiency of service, has that anything to do with it?

A. Oh, yes; efficiency of service has a lot to do with it.

Q. And the type of building, whether it has a low insurance rate?

A. That is not the important factor that you would be inclined to believe. So many companies carry blanket insurance, it is immaterial whether it is stored in a fireproof building or non-fireproof building, although we have fireproof buildings.

Q. You advertise low insurance rates?

A. Oh, yes; but that isn't a factor except with some high-grade commodities. In other words the insurance——

Q. How about temperature conditions, that applies to the same kind of merchandise, doesn't it?

A. Yes, we control the temperature on some commodities, such as compounds. We keep them at a temperature of from 78 to 82 degrees.

Q. How about discounting warehouse receipts, in assisting in financing?

A. We do that, Mr. McCracken.

Q. Some people like to have that assistance?

A. Some do; yes.

Q. And all those factors enter into the question of whether a man chooses a certain warehouse or not?

A. Rates are really the most important factor.

Q. Doesn't this other factor enter into it very seriously, when a man has done business for many years satisfactorily with you or with the Merchants or the Pennsylvania, he doesn't change readily, does he?

A. If there is a factor of saving, he changes sometimes too suddenly.

Q. Is it not a fact that a man likes to stay with his warehouse, like he stays with his tailor or his dentist?

A. If it doesn't cost him any more money.

Q. And this program has been going on, I think you have already agreed, for a great many years, certainly ever since you have been in business—these allowances up to the time they were stopped; they

didn't get any worse, they didn't change any at all between 1926 and 1931, did they?

A. Oh, yes; indeed they did. When there was plenty of business, the competition or the aggressiveness of the Merchants Warehouse Company and their use of that allowance was not as pronounced as it was in later years. In other words, in later years, when business became scarcer, then they went out and used that allowance.

Q. But the allowances were the same under the old tariff? As far as the Pennsylvania Railroad was concerned, there was no difference?

A. There was a difference in the way the Merchants Warehouse Company used it. They used it a whole lot more to lower rates in 1926 to 1930 than they did in the war period.

Q. You and everybody else used any methods possible to get business when business was scarce?

A. Surely.

Q. But I mean that the actual relationship between the railroad and the Merchants Warehouse Company remained exactly the same during this period that you have described?

A. Yes, sir.

Q. So that there was no change in this relationship during these years that we have been talking about from what was going on before?

A. Not that I know of, Mr. McCracken.

RE-DIRECT EXAMINATION.

In the early part of my examination I was asked about some of my customers that left me and I spoke, I think, of the Corn Products Company and said I had a letter from them. I did not produce it in my cross-examination. I now produce the letter. Corn Products Company threatened in that letter to transfer their business to some other warehouse unless we made a

material reduction in our rates and we did that and made a reduction and retained the business. This letter was the start in the negotiations towards a reduction in the rates.

In my examination by Mr. McCracken I spoke several times of an allowance of 50 cents per ton for unloading freight at the Merchants Warehouse. If the freight was both unloaded and then loaded again, in forwarding to some other point, the allowance would be a dollar a ton. In other words, the tariff covered a charge for unloading and reloading.

Mr. McCracken asked me and I answered in response to his question that in every railroad station forty-eight hours' free time—that is without demurrage—is allowed to the customer to take away his freight. Under that practice freight is taken away at the expense of the consignee. He has to send his truck to the freight station and haul that merchandise away. That is the way the consignee gets it away from the warehouse, too, with his own truck, unless it is reshipped.

In answer to Mr. McCracken's question I said that certain other departments of our business were profitable, which enabled us to carry on during this period. I meant that the automobile department and also our trucking department were profitable. Our trucking department consisted of a fleet of trucks that our employees operated in the transportation of merchandise in Philadelphia and surrounding territories. That was a profitable operation during this period. Neither that operation nor the automobile business has any connection at all with the matter now in suit.

When asked by Mr. McCracken about contracts which were offered in evidence on our behalf in the suit before the Interstate Commerce Commission, and which indicated that there were certain allowances

made by another railroad to a certain warehouse which was evidently under some contract with that railroad, I said that the allowances given by that contract between the Reading Railroad and the warehouse were considerably less than the one between the Pennsylvania and the Merchants Warehouse. That difference was as follows: On general merchandise they only received an allowance on inbound tonnage of 35 cents per ton. They got nothing whatever on the outbound tonnage; whereas the Merchants Warehouse Company got 50 cents on the inbound tonnage and 50 cents a ton on the outbound tonnage. So far as news print was concerned, the Reading Railroad only paid 15 cents on the inbound movements and nothing on the outbound movements; and the Pennsylvania Railroad paid the Merchants Warehouse 50 cents a ton for the handling of the news print both inbound and outbound. In addition to that, a marked difference was that the warehouse of the Reading Railroad had to pay demurrage if it accrued, whereas the Merchants Warehouse Company were not subject to demurrage charges. No allowance on inbound l. c. l. traffic was allowed by the Reading contract; but was allowed in the contract between the Pennsylvania Railroad and the Merchants Warehouse. It was these differences that led me to make the statement that it was the Merchants who fixed the rates in Philadelphia.

Confining my answer to our package freight business, which is all that we are concerned with here today, it is my recollection that our business decreased from 1926 on.

RE-CROSS-EXAMINATION.

By MR. MCCRACKEN:

Q. Although you admitted that your general business increased during '26, '27 and '28?

A. I told you that I didn't have the figures here, but that is likely, because we did expand our trucking operations during those years.

When shown some figures compiled by the defendants and showing that in the year 1927 Terminal Warehouse Company did a total business of 311 million pounds plus of freight coming in by rail, in 1928 328 million pounds plus, in 1929 333 million pounds, and in 1930 a drop to 290,000,000 pounds, the witness stated that he had never seen these figures before and certainly could not vouch for them. He did not think they would have any bearing on the results of his business. If they took a loss in one department, it would not increase their profit in another.

I told Mr. White in my examination this morning that we did on the average over this period about 153,000 tons a year. Now 153,000 tons amounts to 306 million pounds, so that is awfully close in the first year. If those figures are correct in the first year they would probably be approximately correct for the next two years. They look about all right.

Mr. White asked me about the Reading Railroad contracts that were offered in evidence in the Interstate Commerce Commission case: The B. & O. contracts were also offered in evidence in that case. I know that the B. & O. pays 50 cents a ton on both inbound and outbound freight; but the B. & O. freight is inconsequential. As I recall it, the B. & O. contract called for the same payments as the Pennsylvania Railroad were making.

By Mr. White:

If the figures shown to me by Mr. McCracken include all the freight that came in over the lines consigned to us or in our care then it would include all of that automobile traffic which is not a part of our package freight and is not related to package freight. Our

package freight tonnage would not be that high. I do not know what character of freight was included in those figures.

By Mr. McCracken:

Mr. McCracken states that all character of railroad freight are included in the figures. Then I would say that the figures included unquestionably the automobile freight, which is not package freight.

Mr. White: If the Court please, the witness has not had an opportunity of getting these figures yet, but I will recall him tomorrow morning, as it is now about the closing hour.

By Mr. White:

Q. Mr. Sullivan, I call your attention again to the statement, in five volumes, which you prepared, and which I will have marked at this time Plaintiff's Exhibit 18 for identification. The statement you have made up, as I understood you yesterday, relates only to the package freight handled through your warehouse within the period covered by this suit?

A. Yes, sir.

Q. And the figures that you have compiled or estimated relate only to the charges for handling?

A. Yes, sir.

Q. Not charges for storage or any other service?

A. Just handling.

Q. Just handling charges, and I understand you have eliminated from this statement any items as to which your records were not perfectly clear?

A. That's correct, Mr. White.

Q. Now, will you state the amount you received for handling freight, which is covered by your statement?

Mr. Barnes: I object to that, sir. We both object to it.

MR. MCCRACKEN: Your Honor, that is not what he stated yesterday. What he stated yesterday was that he intended to prove by this man, first, the normal amount of storage, whatever that may be, and whatever he got from the storage.

MR. WHITE: I asked him what he got for handling.

MR. MCCRACKEN: You said "storage" yesterday.

MR. WHITE: No, no; I didn't mean that. It relates to the handling charges on package freight through the warehouse.

MR. MCCRACKEN: If the Court please, that is not admissible in this case for the reason, among others, that this man stated on the witness stand that his company did not bear that charge, that it was passed on to his customers.

It is not also admissible from this volume, because this man stated on the witness stand yesterday that more than half of these shipments came over the Reading Railroad, and certainly that handling charge cannot be charged to the Pennsylvania Railroad; and that certain portions came there by truck, and that cannot be charged to any railroad.

(Discussion off the record.)

(Objection overruled. Exception noted for the defendants by direction of the Court.)

MR. WHITE: Will you read the question?

(Question read as follows: "Now, will you state the amount you received for handling the freight, which is covered by your statement?")

THE WITNESS: Our revenue for the handling of package freight in our warehouse during this period amount to $365,517.47.

By Mr. White:

Q. What would have been the amount you would have received had you been able to charge your normal and usual prices for that same handling service?

Mr. Barnes: We also object to that, your Honor.

Mr. McCracken: We also object for the additional reason that there has not been any definition in this case of what is a normal price.

Mr. Barnes: And I make the further objection that it is putting in the witness's mouth by that question, if there is any case for the jury here, a function for the jury.

The Court: Mr. White, the expression "normal" or "ordinary" or "usual" or whatever the word was is no standard of comparison. This witness knows the prevailing prices, and he may testify to them. I think he may say how much he would have received, except for this undercutting.

Mr. White: Yes.

By Mr. White:

Q. How much would you have received at the prevailing prices if it had not been for this undercutting?

Mr. Barnes: If the Court please, I object to that for the reason I have already stated, and specifically because it asks the witness to testify to something—if it is relevant to the case—which belongs to the jury exclusively.

The Court: That goes to the form, then, Mr. White. You might alter your question. You are asking him for the difference?

Mr. White: No; I am not. I am asking him what he would have received.

MR. MCCRACKEN: Then I object, sir, for the further reason that the witness testified on the stand yesterday that here were no such things as prevailing prices in Philadelphia.

(Objection overruled. Exception noted for defendants by direction of the Court.)

By MR. WHITE:

Q. You may answer.

A. Our revenue for the handling service, computed at our regular tariff rates, would have been $901,795.82.

MR. BARNES: If the Court please, the witness has now answered the question based upon, as I said before, a fact which was denied in his testimony yesterday; that there was any regular tariff rate for this service. This is an estimate made upon a false premise, and I move to strike it out for the reasons I have stated.

THE COURT: As I look at it, it is merely a repetition of the same thing.

MR. BARNES: Not at all, sir.

THE COURT: Do you want the ruling on your objection?

MR. BARNES: I don't want to press it, your Honor.

THE COURT: I want to——

MR. BARNES: Yes, your Honor, I do. I move to strike out the answer, because it is based upon a statement that the difference was on the basis of a regular tariff rate for warehouse business; and he has already testified that there was no regular tariff rate.

(Motion denied. Exception noted for defendants by direction of the Court.)

By MR. WHITE:

Q. On that point, have you included in your statement, page 313 of Volume 5, a copy of what you have designated "Terminal Warehouse Company, handling package rate tables for bags, cartons, cases, crates and metal ingots"?

A. Yes, sir.

MR. WHITE: Now, if the Court please, this table, which consists of several thousand pages—I mean this statement in five volumes, I will offer to counsel for examination and cross-examination, if they desire, of this witness. I do not offer it at this time, because it contains a statement which your Honor said he could not put in evidence, the difference between the normal rates and the rates they had to receive, but I do offer it to counsel for their use, and will furnish them with a copy immediately.

MR. BARNES: No questions.

Testimony of GEORGE M. DALLAS, a witness called on behalf of the plaintiff, Terminal Warehouse Company.

DIRECT EXAMINATION.

I am connected with the Public Ledger Company in the capacity of manager of the Newsprint Department. I have been so engaged by that company from 1921 to date. Newsprint is the paper used for the publishing of newspapers and has a certain basic weight. It comes in big rolls that weigh up to 1600 pounds.

Formerly I had occasion to use the public warehouses in connection with the receipt and distribution of our newsprint. We used the Merchants Warehouse Company for a time. We paid the Merchants Ware-

house Company on the basis of storage for a thirty-day period. We used the Merchants Warehouse from a date before I was connected with the Public Ledger Company that I do not know, up until about the spring of 1925. We made no payment to the Merchants Warehouse Company for newsprint in rolls which were received in cars, unloaded by them and delivered to our trucks within forty-eight hours of arrival. All that service was performed free of charge. During the period of time when I was in a position to determine we were never charged for any demurrage or any detention of cars by the Merchants Warehouse Company.

(No cross-examination.)

Testimony of EDWIN R. MAIZE, JR. a witness called on behalf of the plaintiff, Terminal Warehouse Company.

DIRECT EXAMINATION.

I am an insurance broker, who represented up to 1929 various manufacturers of products which were formerly shipped and distributed in Philadelphia, in the capacity of manufacturer's agent and broker. Some of the manufacturers that I represented were the Drackett Chemical Company, the Bon Ami Company, Sterno, Climalene, Jersey Corn Flakes, and other manufacturers. Most of these companies manufacture specialty products, and serve the grocery, hardware and drug trade.

During the period from 1922 or 1923 or 1924 up to 1929, when I went into bankruptcy, the products of the companies for which I acted as agent were handled through the Merchants Warehouse. The arrangement that I made with the Merchants Warehouse on behalf of these companies as regards the charge for the handling service on products unloaded and delivered

within forty-eight hours depended entirely on the commodity. If it was a specialty—most of our canned goods were stored for a period of time, they were not moved off the platform, only in very unusual cases—on the specialties we were granted forty-eight hours free time and unloading, and no service charge on anything taken out during that forty-eight hours. We were never charged to my knowledge with any demurrage. I never had very much occasion for demurrage.

I used the Terminal Warehouse Company from time to time giving Mr. Sullivan cars for more or less reciprocal purposes. I tried to give him some business. The quality of service one gets in the two warehouse systems are about equal. The location is equally advantageous in both cases to the trade I was serving. I consider them about equally good.

CROSS-EXAMINATION.

I did some business with the Pennsylvania Warehousing and Saf[illegible]osit Company. We did no specialty business w[illegible] them.

Most of the business we had was in canned goods. We had no specialties with them. Practically all our specialties were stored in the Merchants Warehouse and the Terminal Warehouse. On canned goods we were not charged anything for unloading the cars. We did not draw them out in forty-eight hours, as a rule.

Our people did some financing work with the Merchants and they found that of considerable advantage in dealing with the warehouse. Practically all of the warehouses did that.

Testimony of D. W. MEREDITH, a witness called on behalf of the plaintiff, Terminal Warehouse Company.

DIRECT EXAMINATION.

My business at the present is farming. I was formerly in business in Philadelphia as manager of the Northwestern Consolidated Milling Company, which manufactures flour and feed, with its plants located at Minneapolis. I was so engaged in Philadelphia from 1916 to June 1933; and then I went back to the farm.

During that period I had a large volume of flour moving in to Philadelphia from Minneapolis for my account. That flour came mainly over the Pennsylvania and I did my warehouse business with the Merchants Warehouse Company. My arrangements with them for the warehousing of this large quantity of flour, were the usual public storage rates.

Q. And what arrangements did you have with them regarding the flour which was unloaded by them?

A. Forty-eight hours free storage.

Q. You got forty-eight hours free storage? Let me see if I understand what you mean. The flour was unloaded by the warehouse, put on the platform, brought to the tailboards of your trucks and delivered, and if taken away within forty-eight hours you paid nothing except the freight rates?

MR. BARNES: Nothing but the storage rates.

THE WITNESS: Our charges included the loading and the taking away.

By MR. WHITE:

Q. I mean, on those you took out in forty-eight hours, you didn't pay anything?

A. I didn't pay anything.

I recall a letter from our company marked Plaintiff's Exhibit No. 15 and dated January 15, 1928.

It would be very difficult to recall the volume of flour that was merchandised by me through the Merchants Warehouse. We had very heavy receipts annually. It would vary according to the sales. I would have to make a guess at it.

CROSS-EXAMINATION.

I have always had very pleasant relations with the Merchants Warehouse Company. I do not recall accurately the occasion of my writing this letter because different warehouses were soliciting our business all the time; but I should judge the terms and the conditions were no better than what we were receiving. We were receiving very excellent service where we were and we always had been there; and of course there was no use of making a change. This was a reply to a soliciting letter. I imagine they must have written a letter—either wrote us a letter or someone from them called. Of course we were always figuring where we could do the best and their offer wasn't as good as the arrangement we had. That was not the only reason why we did not want to leave the Merchants Warehouse Company. They gave us good service. All things being equal we would stay with the Merchants. We did stay with them until 1933 and they gave us good service. The question of service is an important factor in the warehousing business—an awful lot. As a matter of fact we removed our entire offices down to the Merchants Building at one time.

Testimony of EDWARD KNIGHTON, a witness called on behalf of the plaintiff, Terminal Warehouse Company.

DIRECT EXAMINATION.

I live in New York and am a flour broker. We are still engaged in Philadelphia as a flour broker, having

a branch office there. I was personally in Philadelphia up to three years ago. During that period I acted as a broker in the importation of a considerable amount of flour from various manufacturing companies. I represented various companies in various parts of the country—the Pacific Coast, Minnesota and Nebraska. I had quite a large volume of flour coming in. It was shipped in sacks. It was never put in barrels. The number of sacks required to make a barrel depends on the size of the sacks. 2-98s make a barrel. 196 is the barrel.

Our customers used the Merchants Warehouse in the warehousing of their flour. We had an arrangement for two days free storage and after that it went on the regular storage rates, without any demurrage. The customers paid nothing beyond the freight rate on flour that was taken away within forty-eight hours. We paid nothing for the service of unloading the flour, putting it on the warehouse platform, doing what was necessary in that connection and bringing it to the tailboards of our trucks.

CROSS-EXAMINATION.

As I recall "regular storage rates" were 8 cents per barrel per month. I think the Pennsylvania Warehousing and Safe Deposit Company charged the same amount. The other warehouses wanted 10 cents, if I recall correctly. The customer selected the warehouse.

RE-DIRECT EXAMINATION.

We did not pay the 8 cents a barrel if we took the flour away in forty-eight hours.

RE-CROSS-EXAMINATION.

Our customers used the Pennsylvania Warehousing and Safe Deposit Company on the same terms and with the same lack of demurrage. The terms were precisely the same as at the other warehouses.

Testimony of GEORGE M. RICHARDSON, who was recalled for cross-examination by the plaintiff, Terminal Warehouse Company.

CROSS-EXAMINATION.

I have been engaged with the Merchants Warehouse since 1915. My recollection runs back in connection with these warehouses as far as 1892. We have contracts with the Pennsylvania Railroad under which we are required to perform the service stipulated and designated therein. The service rendered by us when a car of freight arrives at our warehouse depends on the character of the contract and the tariff on which it moved. The traffic that we delivered, as the agent of the railroad, was covered entirely by the agreement. Whatever the agreement stipulated, we had to perform in the way of service.

Referring to my testimony before the Interstate Commerce Commission that we were paid by the railroad for the service of unloading and delivering to the tailboard of the truck and therefore we did not make any charge to the customer, as I stated if we were obligated under the agreement to do that, that's exactly what we did; and if you are referring to the testimony before the Interstate Commerce Commission, that's an accurate statement of the facts. My statement there that if it is delivered in the free time we get no compensation except for service rendered from the Pennsylvania Railroad, would apply on a shipment, for instance, to Mr. Knighton or Mr. Meredith's company; a shipment billed to them in our care, if we acted as the agents of the railroad. It would not apply if the shipment was billed to the Merchants Warehouse Company or if it was billed to the Terminal Warehouse Company. We did not have any shipments of any considerable amount billed to the Merchants Warehouse Company. We were not

interested ourselves. We would have supplies of coal, as an illustration, and commodities of that kind; and any traffic moving on switching tariffs aren't covered by these contracts.

Q. You also paid for the insurance on freight during that forty-eight hours free time, for which you made no charge to the customers?

A. We were responsible under that contract for the care and custody of the freight.

I made a check for the Interstate Commerce proceedings to determine what percentage of our traffic was delivered within the forty-eight hours free time; I found that in some locations 35 per cent. of all the inbound tonnage was delivered within the free time and at other locations 75 per cent. including the outbound tonnage.

RE-DIRECT EXAMINATION.

Our river front warehouse has a great deal of traffic delivered from both the Reading and the B. & O. Railroad. Our larger warehouses are served by the Belt Line. We get that traffic by special arrangement with the owner of the freight and we are not paid anything for unloading it by the Pennsylvania Railroad. Our contracts with that railroad cover only traffic moving via the Pennsylvania lines.

RE-CROSS-EXAMINATION.

By MR. WHITE:

Q. When you got traffic moving over any other railroad, you did make a charge for that service?

A. Yes, sir.

Testimony of ROBERT H. RISSINGER, a witness called on behalf of the plaintiff, Terminal Warehouse Company.

DIRECT EXAMINATION.

In the claim reports which I have prepared there are eight schedules. Schedule 1 shows the amount of the allowances paid by the railroad to the Merchants during the suit period. Schedule 3 is a statement of the nine selected months showing the tonnage of intrastate shipments and interstate shipments on which claims were paid to the Merchants Warehouse Company by the Pennsylvania Railroad. We took nine months and took the records of all the cars moving in the nine months to the Merchants Warehouse. Schedule 3 is made up from the records of the Pennsylvania Railroad which shows where the cars came from.

The percentage of interstate traffic for the whole nine months examined was 77.6 per cent. of the total tonnage handled by the warehouse in those months.

Schedule 5 is an exact copy of the claims paid to the Merchants Warehouse Company by the Pennsylvania Railroad for the months of September, 1928. It shows the nature and kind of traffic moving, whether it was flour or cement, or cans of soup or whatever it was. It shows the origin of the traffic. I have a similar schedule for two other selected months, October, 1929, and March, 1933. My last report, or my second report, relates to car detention, which I have already described.

MR. WHITE: If your Honor please, I offer this report and the supporting schedules in evidence.

MR. MCCRACKEN: In what amounts?

MR. WHITE: In the amounts of allowances paid during the period covered by the suit by the

Pennsylvania Railroad to the Merchants Warehouse, and including the data, which he has assembled, showing during that portion of the period, that he was able to examine, the amount of detention to cars.

MR. BARNES: He had the opportunity to examine all of them.

We object, if the Court please, for the same reasons given when the witness was formerly on the stand, and fully discussed with you. Those discussions appear upon page 54 and the following pages in the record, on which you made a ruling, which is shown on page 56; and we submit, further, that the testimony this morning does not take this witness's testimony out of the ruling which your Honor made at that time.

(Objection overruled. Exception noted for defendants by direction of the Court.)

By MR. WHITE:

Q. Have you a complete set of your reports there?
A. Yes, sir.

(Reports in question marked Plaintiff's Exhibits 19 and 20, respectively, to be treated as physical exhibits.)

By MR. WHITE:

Q. Will you state the amount of allowances that the records examined by you of the Pennsylvania Railroad show were paid during the period covered by the suit—paid to the Merchants Warehouse Company?

MR. MCCRACKEN: Objected to.

MR. BARNES: So that the record may be complete as to the exact question asked, will you please read the question to the Court?

(Question read.)

MR. BARNES: We object, and Mr. McCracken also objects on behalf of the Merchants.

THE COURT: The objection is overruled for the same reasons before stated, and an exception is allowed to the defendants.

By MR. WHITE:

Q. Will you state the amount?

A. The amount of the claims paid by the Pennsylvania Railroad Company to the Merchants Warehouse Company for tonnage handled during the period from March 1, 1926, to March 31, 1931, was $634,886.16.

Schedule 5-B, which is an exact copy of the claims filed by the Merchants Warehouse Company for the month of March, 1931—the claim filed by the river front stores—shows a shipment consigned from Manchester, Connecticut, to the Bon Ami Company, Inc., car NH-165359, weight 37,175 pounds. In the same schedule, on the claim filed by the Webb Warehouse, there was a shipment consigned to the A. E. Turner Company, c/o Merchants Warehouse.

My schedules show the proportion of freight on which the thirty-five cents allowance was paid and the proportion of weight on which the fifty-cent allowance was paid to the Merchants Warehouse. Schedule 4 shows the tonnage that was handled by each warehouse. Schedule 2-a shows the detail of the amounts of payments that were made to the Merchants Warehouse. The other payments were made at the rate of fifty cents per ton for all warehouses except the Kenilworth Stores and the Bainbridge Stores. The aggregate tonnage handled by Kenilworth Stores and Bainbridge Stores was 116,496 tons and seven pounds, or 8.6 per cent. of the total tonnage handled, which was paid for at the rate of 35 cents per ton. During the period covered by the present suit, 8.6 per cent. of all the tonnage handled through the Merchants Ware-

house was paid for at a rate of thirty-five cents a ton and 91.4 per cent. was paid for at the rate of fifty cents per ton.

CROSS-EXAMINATION.

By MR. BARNES:

I went out to the offices of the Pennsylvania Railroad in West Philadelphia with instructions to make the examination to which reference has been made. I understood that Mr. White and counsel for the railroad agreed that I should make that examination of the books.

Q. And the instructions, so far as you know, that were given were that you should have full access to every book of record that you wanted to examine?

A. Yes, sir.

Q. And did you have that full access to all the records; anything you asked for at the railroad office?

A. I believe we had access to any records that were available.

Q. Anything that you stated that you wanted?

A. Anything that I stated.

Q. That you wanted?

A. Yes, sir.

Q. The fullest cooperation there with the people that you met at the office, to get the information that you wanted?

A. They extended us every facility to make the examination.

By MR. MCCRACKEN:

These figures that I show for these payments include payments made on tonnage coming in from within the State of Pennsylvania. I said 77.6 per cent. of the shipments during the period of suit were interstate shipments but I did not say that the balance was intrastate shipments. As a matter of fact we were able to identify 19.5 per cent. as intrastate and 2.5

per cent. we were not able to identify whether they were interstate or intrastate. We classify as an interstate shipment tonnage originating at or destined to points outside of the State of Pennsylvania. That means, so far as the Merchants Warehouse Company is concerned, that tonnage coming from Maryland or Delaware or Ohio or New Jersey consigned to somebody at the Merchants Warehouse was classified as interstate. When that tonnage got there it was unloaded and stayed there. It did not just touch the Merchants Warehouse and move on in the same car.

Q. Now, you have told us what you classify as interstate shipments were goods that came into Pennsylvania from other states consigned to the Merchants Warehouse, and unloaded there, plus goods that started at the Merchants Warehouse, having been there, and were loaded onto cars and taken outside of the state?

A. That is correct.

Q. But in both of these cases the goods were in the Merchants Warehouse Company for some period of time, whether it was for a minute or an hour or twenty-four months?

A. The cars that we checked were billed on the Merchants Warehouse claims as having been handled by the Merchants Warehouse during those months.

Q. On their own floor?

A. Yes; I infer that means they were unloaded on their own floor.

EVIDENCE ON BEHALF OF THE DEFENDANTS.

Testimony of HUBERT J. HORAN, a witness called on behalf of the defendant, Merchants Warehouse Company.

DIRECT EXAMINATION.

I live at 2300 Pine Street. I am a wholesale flour distributor. I have been in that business over fifty years. I am now a member of the Commercial Exchange. I am a past president of that Exchange. I was a member of that Exchange in 1884.

About 1886 a movement was started by the Pennsylvania Railroad to build a flour warehouse at Eighteenth and Market Streets. At that time they owned the property there, the old West Chester Railroad Station. The men in the flour business, particularly those who had warehouses of their own, had the matter laid before them; and it was explained to us that we would be permitted to purchase a percentage of the stock of the Merchants Warehouse Company. As I remember it, the railroad would have 55 per cent. and the general public would have 45 per cent.

The proposition was to centralize the handling of flour in that warehouse, just the one warehouse at that time. They claimed that it would be economical and to the best advantage of the whole trade. Personally I was not in favor of it, because I had a warehouse. I had just purchased it at 2015-17 Market Street, and I realized that with the different rates that they would give us, my own warehouse would be a burden instead of a benefit. They established the warehouse at Eighteenth and Market Streets.

They established rates; and as I remember, the first rate given to us by the Merchants Warehouse was ten days' free storage. That rate changed at different periods until it got down to forty-eight hours' free

storage and a flat rate of 8 cents a month. The first warehouse that was built was the flour warehouse at Eighteenth and Market. Subsequently, to meet the requirements of the different sections in Philadelphia, warehouses were established at other points. The next warehouse that I remember was the Shackamaxon at Front and Laurel; the next warehouse that I remember was at Fifteenth and Carpenter; then a warehouse at Thirtieth and Chestnut; subsequently they built one at Front and Federal; and then at Front and Chestnut. Roughly that's as far as I can remember the different warehouses.

The Pennsylvania Warehousing and Safe Deposit Company came in, I would say, some years afterwards. The Reading Railroad had a square of ground at Broad and Callowhill; and they gave us what was called track delivery. It was not very satisfactory, because they claimed that when they broke the seal of the car and allowed us to start to haul, we were responsible for it after that; and then if we had claims for damage in the car, which we couldn't discover until we unloaded it, there was a dispute all the time. The result was that wherever possible you diverted it from the Reading delivery and put it into other warehouses where you would get the service.

That I believe resulted in either the Reading Railroad or the Pennsylvania Warehousing and Safe Deposit Company building a flour warehouse at Sixteenth and Callowhill in the 90's. It might have been in 1894, I do not know. I do not know who built this warehouse, but it was a warehouse of the Pennsylvania Warehousing and Safe Deposit Company which afterwards built quite a number of warehouses in Philadelphia with Reading and B. & O. connections.

The Terminal Warehouse Company came into existence in 1904 at a time when this system which I have described had been in effect for quite a number of years.

I was doing business with the stores of the Pennsylvania Warehousing and Safe Deposit Company and the Merchants Warehouse Company and have continued to do business with them down to date, both for myself and some of the exchanges I represent. I do not think I ever did any business with the Terminal Warehouse Company, to the best of my recollection.

I was for a great many years the chairman of the Flour Committee of the exchange; I was on the Transportation Committee and also president; and we as a body took up the question of storage rates on flour with the two warehouse companies. I do not think any individuals took it up; I think it was all done through our organization with the warehouses. We held meetings, and when they wanted to make rates or changes, we took it up with them, and tried to reach some point which was mutually satisfactory. It was purely a matter of negotiations between the large group of customers which I represented through the commercial exchanges and these warehouses.

I would say that the rates between the warehouses on flour were uniform.

The question of free unloading was a very important factor in attracting us to either of these warehouses, the Pennsylvania Warehousing and Safe Deposit Company or the Merchants Warehouse Company, because of the large percentage of flour I would sell to people; and then the right—as long as it gave us the privilege of examining it, it was all right, and then they wanted to make a change in the free period—if it went over the free period, we would have to pay 8 cents a barrel. That applied to both the Pennsylvania Warehousing and Safe Deposit Company and the Merchants Warehouse Company, exactly the same. There are a number of other warehouses in existence in Philadelphia besides the three I have mentioned. There is a big warehouse uptown and then there are warehouses downtown that I know of.

A very important factor in the customer's choice of a warehouse is the question of hauling. A man who was uptown and who had a haul from Front and Federal, it was a serious proposition, so that the location was a very important one and we put it in the warehouse that suited our customers best for the haul or suited us best for the haul. We had always to take that into consideration. In sending orders to the mills, we designated the warehouse it was to go in.

The factors entering into my choice of the warehouse were location and rates; what we would have to pay. Those were the two factors. Location was a very important factor on account of the cost of handling from a hauling standpoint. I don't think we ever had any question on service.

A great many of our people used the financing facilities of the warehouses to borrow money; they put the flour in the warehouse as collateral. Both the Merchants Warehouse Company and the Pennsylvania Warehousing and Safe Deposit Company do that business. It is a very important factor for the small jobber who has to carry stock. He would borrow the money on it, just as he needs it; if he wants ten barrels, he pays for ten barrels, and so on down.

During all of this period we have been speaking of, all the way from 1887 to 1933, the changes in the methods of doing business with these warehouses, the Pennsylvania Warehousing and Safe Deposit Company and the Merchants Warehouse Company, were a shortening of the time of free storage and the raising of rates. The raising of rates or charges went over a period of time. They went up to 3 cents and then to 4 cents. We were fighting the raises and it was a battle. Every time they attempted to make a raise, of course we protested and did our best to stop it. In other words, when we could find anything that was beneficial

on our side of the case, we brought it in. The tendency was always up in the way of charges.

The private warehouses that were in existence away back in 1886 and 1887, and so forth, were gradually eliminated as a result of this public warehousing business and went out of business. I guess there were about forty or fifty private warehouses at that time. By "private" warehouses I mean where a man had his own warehouse and carried on his business. My warehouse was at 211-13 Market Street. Of course they got to be no good. This great string of public warehouses throughout the city has taken the place of all those private warehouses.

CROSS-EXAMINATION.

The Merchants Warehouse chains were established away back about '87 and they performed a satisfactory service for all flour which came over the lines of the Pennsylvania Railroad. The Reading found that it was losing traffic and established their warehouse with somewhat similar arrangements as those between the Pennsylvania and the Merchants. We were getting better service in the Merchants Warehouse than we were getting in an open lot. In view of that fact we diverted our traffic over the Pennsylvania until the Reading got its warehouse established—it was an economic proposition. The Reading warehouse and the B. & O. later still, were established a few years after they had got going.

Q. And you are aware of the fact that they had to do it in self-defense, otherwise they would have lost all the flour business coming into Philadelphia?

A. Well, I wouldn't say that. The Reading, of course, has certain localities and the Pennsylvania has certain localities.

Q. But wherever the customer was served by the two lines, of course if the Reading did not have its own

warehouse, they would have gone over to the Pennsylvania; that is true, is it not?

A. You see, the warehouse would send you a notice, give you the number of bags in the car. If there was a shortage, they would give you that. If they were torn or damaged, they would give you that. That was the proof of the claim, and that was the advantage over the track delivery.

When you had team delivery, you had to go straight to the car and take your flour. That wasn't satisfactory. You can readily see, the railroad, once it broke the seal—up until they broke the seal, the railroad was responsible, and when you sent a man there they did their level best, but it was one of those things you could not handle satisfactorily. The other was more economical and safer.

Up to the time that the Reading established its warehouse, which we can call a contract warehouse somewhat similar to the Merchants, flour was handled in Philadelphia through the Merchants and through the warehouse of McKnight and Son at Nineteenth and Market, which warehouse took flour on storage. What wiped out all these warehouses on Market Street was the building of the "Chinese Wall."

I was very active in business from about 1886 to 1931 in Philadelphia. I suppose I am one of the few left who is familiar with the amount of flour traffic from the starting point. The volume of flour business coming into Philadelphia annually is, roughly speaking, about 2,000,000 barrels. The flour consummation in Philadelphia is about 2,000,000 barrels. I couldn't tell you whether any independent warehouses other than the contract warehouses, the Merchants and the Pennsylvania Warehousing and Safe Deposit Company, handle any of that business, because I don't—yes, I am sure they did. I am almost certain that the Terminal Warehouse handled flour. I think so. I don't

recall any other independent warehouses besides the Terminal, because I would not come in contact with them; but I have a definite recollection of somebody putting flour in the Terminal Warehouse. I would say that the great bulk of flour went through the Merchants. I cannot answer whether practically all flour that came over the Pennsylvania Railroad went to the Merchants Warehouse. Nor can I answer whether practically all the other came through the Pennsylvania Warehousing and Safe Deposit Company, because I haven't the slightest idea. I am only figuring on the amount of flour that comes here; by the figure that everybody buys one barrel of flour a year and with 2,000,000 people we have 2,000,000 distribution.

During all that period I have dealt with the Merchants and the Pennsylvania Warehousing and Safe Deposit Company. About the Merchants particularly, I think I said that if I took my flour away within forty-eight hours I didn't have to pay 8 cents a barrel. I didn't pay anything at all beyond the freight rate. I don't know how I could answer the question that "of course, as long as your Company continued, I would not go to the Terminal or any other warehouse" —because I never got in the way of doing business with the other warehouses. As far as I know I was never solicited by the other warehouses for business. I would not go to the other warehouses as long as I got the forty-eight-hour free time.

RE-DIRECT EXAMINATION.

With regard to this large tonnage of flour that I spoke of that comes in to Philadelphia, a large portion of it goes to the big bakers. A large portion of it goes to Freihofer's. That represents a very large percentage of it. There are other big bakers besides Freihofer's—Colonel Kolb's concern. Today 40 per cent. of the flour does not go to any warehouse. That

is the enormous growth in the last fifteen or twenty years in the baking business.

In the last year or so I have not got that forty-eight-hour free storage from the Pennsylvania or the Merchants. I have not changed my warehouses.

Testimony of GEORGE M. RICHARDSON, a witness recalled on behalf of the defendant, Merchants Warehouse Company.

DIRECT EXAMINATION.

I came to the Merchants Warehouse in 1917 and have been with them ever since. I am general manager and treasurer. For the information of ourselves and the jury I made out a list of when each of our various warehouses was built—founded. That is from our own records.

The first warehouse was established at Eighteenth and Market and was opened for business in January, 1887. There was also established in January, 1887 a warehouse at Thirtieth and Market Streets in West Philadelphia, designed for the storage and distribution of hay, straw, feed and commodities of that kind. The next warehouse, as there appeared to be a need for the facility at that time, was the river front stores at Delaware Avenue and Chestnut Street, in which our people invested approximately a million dollars in the development of that property. This was in 1902. In 1904, the warehouse at Eighteenth and Market Streets was closed and a new property at Fifteenth and Carpenter Streets was opened. I retrace my steps as I missed the Kensington warehouse which was opened in December, 1894 and was designed to handle flour and feed to serve that section of the town. In 1895 the Shackamaxon stores in the Shackamaxon district was founded, designed for the storage of flour

and food products principally. In 1917 we took over the building known as the Webb property, adjoining our river front stores at Delaware Avenue and Walnut Street. That same year we took over the federal stores at Front and Federal Streets. In 1922 we established the Bainbridge stores after one of the plaintiffs here had bought a property over our heads and thrown us out of Delaware Avenue and South Streets. In 1925 we took over another property known as the Kenilworth stores. In 1927 a group of buildings known as the Franklin stores at Delaware Avenue and Kenilworth Street was opened—that was in 1924. That completes our developments.

Yesterday I testified that the capacity of these warehouses in square feet area was upwards of a million square feet; but upon checking I find that the gross area is approximately 1,500,000 square feet. With each of these warehouses there have been contracts with the Pennsylvania Railroad from the beginning of the operation of the warehouses.

Witness was shown the original agreement of July 15, 1886, which he identifies as the agreement between the Pennsylvania Railroad and the Merchants Warehouse Company covering the original warehouse at Eighteenth and Market. Witness was shown the November 2, 1886 agreement which covers the Thirtieth and Market Streets property. He was shown the June 27, 1894 agreement which covers the Shackamaxon stores. He was shown the May 7, 1904 agreement which covers the original river front stores. He was shown the November 1, 1904 agreement which covers the Carpenter Street warehouse; he was shown the April 1, 1901 agreement which covers the river front stores. He was shown the November 1, 1894 agreement which covers the Kensington hay warehouse. He was shown the January 25, 1917 agreement which covers the entire portion of the river front

stores and Webb stores. He was shown the March 4, 1925 agreement which covers the Kenilworth stores and the July 28, 1927 agreement covering the Franklin stores.

From the beginning, which evidently some of these contracts cover, down to the month of May, 1931, there was a contract similar to each of these in existence between each of our stores or warehouses and the Pennsylvania Railroad—either the original contract or renewals or extensions of them.

(The several agreements and contracts were offered in evidence as Defendants' Exhibit No. 1, not to be copied into the record.)

We call these contracts all "lease agreements." I suppose the lease covers the property owned by the railroad, and the agreement covers the property we own or lease from other parties.

The railroad owns the Kensington stores. The railroad owns the ground and all improvements including the side tracks at the Shackamaxon stores. The railroad owns the Federal stores, the Carpenter Street stores and West Philadelphia warehouse. Merchant Warehouse Company owns the building known as the Shackamaxon stores, the ground and improvements known as the river front stores, the ground and improvements known as the Bainbridge stores, the ground and improvements known as the Kenilworth stores, and the ground and improvements known as the Franklin stores. Charles J. Webb and Sons owns the warehouse known as the Webb stores.

In the cases where the railroad owns the building and the land the agreement is really a lease by Merchants Warehouse Company from the railroad. In the other cases they are agreements for handling between Merchants Warehouse Company and the railroad. Leases also contain the handling terms.

During this entire period, there was no change in the method of doing business between the Railroad Company and my company in so far as I know. The relationship has been practically the same, carried on from 1887, the date of the original contract. That relationship has been fully described here as having to do with the receipt and handling of freight, the forty-eight hours' free storage and so on. It has continued during this whole period up until 1931.

The tendency from the time I came into the company was to increase rates, I would say up until and following several years of the War period. That was due of course to conditions over which we had no control—the increased cost of operation, maintenance cost, everything you bought to make any repair around the warehouse, clerical expense, everything cost more and we had to pass that on to our customers naturally. The City of Philadelphia charged us with increased taxes; and we tried to be good citizens and go along and do our part. These increases continued up until 1929.

My original employment was soliciting. I was not sorry to get higher charges, because the more attractive the contracts I could furnish the more valuable my services. Of course, if I know my business, I know what our competition is, the competition of the other warehouses in Philadelphia, and I tried to sell the facilities of the Merchants Warehouse Company to you on an even keel.

The practice in Philadelphia in a great many instances is to fix package rate and tonnage rate, and then a big part of our business is leasing space in our warehouse in competition with other real estate agents. We may lease a whole building to a man for a year, a longer term if possible—five years, ten years. To good people as long as we can arrange the terms on a satisfactory basis; and then of course our rates are

determined by the competition and our practice is governed by our competition.

There are some eight or ten warehouses in Philadelphia and they all enter very materially into competition with us.

During the period from 1926 to 1931 we were receiving these payments from time to time from the Pennsylvania Railroad for handling service. The payments were stipulated in the contracts. Consistently the service cost was a great deal more than what we received in the way of compensation from the railroad. We did not make any money out of these payments. The operation netted us a loss.

During that period, we never cut below the level of our competition—never. I think you will find a great many complaints against us because we didn't want to meet competition. I mean we did not want to go down below, as low as our competitors. These complaints were from our customers. I thought that with our allowances and our facilities and the way we can serve these people we should get a premium instead of some ridiculous price that they had been getting from our competitors from time to time. There have been shifts of customers from the Terminal Warehouse Company to us at times and then the tide flows again the other way. From time to time Terminal took several customers away from us that almost made me cry. One such customer was the Public Ledger Newsprint Company, one of the best customers we ever handled; four or five carloads of freight a day, what we call heavy density freight, wonderful people to do business with. Terminal moved them bag and baggage in 1925 at a rate lower than we thought we had successfully negotiated. We never got them back.

Another such customer was the Simmons Bed Company, wonderful people. When we first took over the Bainbridge stores covering approximately 120,000

square feet of floor area, we leased half of that building to the Simmons Bed Company; we made improvements at a very considerable expense; special elevators and other improvemnets of that kind. We had a contract with them at what was a fair market price at the time— 45 cents per square foot per annum for the space. The Terminal took them away from us, and buttoned them up for a term of ten years and they took them up to the Noble Street warehouse. That's the one that almost made me cry.

We tried to break into the automobile trade. In 1917, I think it was, when we took over the Federal stores. We successfully negotiated one or two contracts with the Bigelow-Woolley people and the Paige Automobile Company; but since then Mr. Sullivan took them back and we could never compete with him. He has had a monopoly of the automobile trade ever since I have known anything about the automobile trade.

Q. Incidentally, were payments made to you by the Railroad Company for unloading automobiles, like other types of freight?

A. Those automobiles were considered package freight. The distinction between package and bulk, bulk would be a commodity like iron ore, China clay; materials that you handle with buckets and shovels.

Q. Or coal and grain?

A. Bulk materials; yes, sir.

Another account that we lost to Terminal Warehouse Company is the account of the Fairbanks-Morse Company, which specializes in marine equipment, scales, oil engines and all that kind of equipment. We had a contract with them for a long period. They used I think about 15,000 square feet of space in our Federal stores. We had just the kind of equipment they needed—large elevators, and wonderful platforms over which to handle their freight to and from the warehouse. When this new development which you

speak of came along in 1931, the representative of Fairbanks-Morse Company told me that they had successfully negotiated a contract for a long term of years in the new building on a very much lower basis than the one we had. They moved out bag and baggage, and continued to pay us rent for a period of eight months. They said—"the other fellow took care of that—took up the slack."

Another account that we lost to Terminal Warehouse Company was that of the J. B. Ford Sales Company. They specialized in washing powders, soaps and commodities of that kind. We had them over an extended period of years. They had their offices in our building. Terminal Warehouse Company made a proposition and took them away from us. That was on a package basis.

Another account that we lost to Terminal Warehouse Company was that of Richardson & Boynton Company, furnace people. We had them for a period of years, probably twelve or fourteen years, in our Webb building. The relations were very satisfactory, very pleasant. They took them away and moved them up into the new Terminal Commerce Building in competition with us.

Another account that we lost to Terminal Warehouse Company was the Association of Grocers' Manufacturers, I think that is the corporate title. I think Mr. Sullivan referred to this account. They took the T. A. Snyder Preserving Company, the Calumet Baking Company, the Cream of Wheat Sales Company, D. L. Ward, a paper organization, and others that I just can't recall. I have a memorandum of the names; and just quite recently they took all of the newsprint paper we had been handling at Carpenter Street for the publications—the Record, the Camden Courier, the German paper, Gazette, the Italian paper, Opinion, the Trade Journal, and some

other papers down there. We understood that the Terminal Warehouse Company had a contract with the Reading Railroad which enabled them to move that traffic and get paid, not at the rate as stipulated in our contract, but I think at the rate of approximately $1 a ton, and that would make the contract legal. We got fifty cents and they got $1; that's my understanding.

All these customers that we lost to Terminal Warehouse Company told us that they had made contracts on a basis which was more attractive when compared with the rates we were asking. I mean they carried them at a lower rate than we did. We have gotten business from Terminal Warehouse Company; but, as I said before, the balance of trade is very much against us.

Witness was shown by defense counsel a sheet containing certain figures of the record of tonnage of goods carried into and handled by Merchants Warehouse Company from 1927 up to the end of 1932. These figures were compiled at the direction and under the supervision of the witness; and showed the tonnage received by Merchants Warehouse Company over the three railroads in the period from January 1, 1927, until December 31, 1932, inclusive. This tonnage is shown in cars and pounds. These figures show the tonnage handled and the trend, whether tonnage is going up or down during the period. They show the tonnage that went into each of the warehouses of Merchants Warehouse Company. These figures are a transcript from the original records of Merchants Warehouse Company.

The tonnage handled by the Merchants Warehouse Company, divided into railroads, is as follows:

1927: Pennsylvania, 15,800 cars, weight 668,117,662; Reading and B. & O., 275 cars, weight 8,836,940; total cars, 16,075; total weight, 676,954,802.

1928: Pennsylvania, 14,468 cars, weight 609,808,-087; Reading and B. & O., 270 cars, 8,266,195 pounds; total cars, 14,738; total weight, 618,074,282. Poundage dropped from 676,000,000 in 1927 to 618,000,000 in 1928.

1929: Pennsylvania, 13,326 cars, weight 562,226,-326; Reading and B. & O., 319 cars, 9,803,867 pounds; total, 13,645 cars; total weight, 572,030,193. That is a drop from 618,000,000 to 572,000,000 pounds in that year.

1930: Pennsylvania, 10,620 cars, weight 468,349,-022; Reading cars, 195, weight 6,264,184; total cars, 10,815; total weight, 474,613,206. That is a drop of approximately 98,000,000 pounds.

1931: Pennsylvania, 8190 cars, weight 353,927,343; Reading and B. & O., 247 cars; weight, 9,659,858 pounds; total cars, 8437; total weight, 363,587,201 pounds. That is a drop of 100,000,000 that year.

1932: Pennsylvania, 5082 cars; weight, 211,316,-797; Reading, 381 cars; weight, 14,326,304; total cars, 5463; total weight, 225,643,101 pounds.

1933: Pennsylvania, 5039 cars; weight, 201,357,-216; Reading and B. & O., 371 cars; weight, 12,406,635 pounds; total cars, 5410; total weight, 213,763,851.

Between 1927 and 1933 the business of our warehouse in Philadelphia went down from 676,000,000 pounds in 1927 to 213,000,000 pounds in 1933. We did one-third of the business in 1933 that we did in 1927. These figures were compiled at my direction; and I was in charge of their preparation.

Witness was handed a map of Philadelphia and district, showing various warehouses in different colored circles. Warehouses marked with a circle are the groups operated by the Bailey Warehouse Company, the Merchants Warehouse Company, and the Terminal Warehouse Company. They are marked in different colors. The map spots or shows the various

public warehouses operated in various sections of Philadelphia and by a group of ten or fifteen warehousing companies. The two properties designated by red circles and by the numerals 3 and 4 are the properties operated by the Bailey Warehouse Company. The blue circles are the houses or properties of the Merchants Warehouse Company; the green circles are those operated by the Terminal Warehouse Company and the black circles are for all the others. From the knowledge of the witness of the location of the several warehouses that are enumerated there, the map accurately represents their locations. The witness knows where all these warehouses are.

Merchants Warehouse Company has specialized in what the other side calls "heavy density freight." That will be flour, feed for animal consumption, canned goods, California dried fruits, California canned fruits, cotton knitters, cotton, wool, general line of grocery products, newsprint paper and a general line of merchandise that is warehoused and distributed through public warehouses. That is the character of business Merchants Warehouse Company has solicited.

We have tried to fix a rate that represents reasonable compensation for the services we render—the addition of labor, the cost involved, and a fair return on the amount of space utilized for storage. We have very severe competition in all of these commodities. On flour, feed, hay and straw, rates have been established as a result of negotiations with the officers and the various committees of the Commercial Exchange of Philadelphia. All flour buyers, all flour dealers, all hay and straw men, all the feed men within a radius of a hundred miles of Philadelphia, are members of that organization.

The warehouse chain, which is our principal competitor, on that character of goods, is the Pennsylvania Warehousing and Safe Deposit Company. On canned

goods, Pennsylvania Warehousing and Safe Deposit Company are real competitors. They have wonderful properties; they finance, they have the same area as we have; they have great experience behind them and are wonderful people. Bailey's is a cheerful competitor; Terminal is severe competition.

Our rates on canned goods—I would say those originating on what we know as the eastern shore of Maryland, Delaware and Southern Jersey—are in some instances in real competition with the city of Baltimore and Wilmington, where they have the same system of warehousing and holding canned goods for distribution over a crop year, financing, and the same transit arrangements apply. Our real competition on canned goods would be Baltimore, Wilmington and the policy of our big competitors in Philadelphia.

We handle all kinds of other commodities that are generally handled through public warehouses. Our arrangements for financing customers are as follows:

Our canned goods would be a very good illustration. The average canner does not have the funds to successfully carry with his own money his season's shipments referred to on the Eastern Shore. Take canned tomatoes as an illustration. They must be taken in and must be canned when the tomatoes are ripe. Labor charges are to be met; growers have to be paid; cans have to be paid for and labels. Usually the canner ships to some convenient point—it might be Baltimore, Wilmington or Philadelphia—and borrows from the warehousing company a reasonable amount of money on those goods. We then have the canned goods as collateral; and we borrow money from the banks and loan it to the canners. That is lending on a warehouse receipt.

This lending on a warehouse receipt runs into substantial sums of money. With us the peak would be probably six to seven hundred thousand dollars and

it might go down to a minimum during the early summer—to maybe two hundred and fifty thousand dollars. We borrow the money from the bank and assume liability for that money. We borrow from the bank and lend to the customer—both on warehouse receipts.

We finance other commodities in addition to canned goods—flour. The little jobber in Philadelphia is carried both by us and by the Pennsylvania Warehousing and Safe Deposit Company.

There are a number of other services that we render to the canned goods people over and above unpacking and the lending of money. As an illustration, labelling canned goods. It is to the interest of the packer to ship his product in cans without labels and we put them on. If the car is warehoused with us in Philadelphia; and a chain store system in New York or in the middle west or what we call the Central Freight Association territory, or a Philadelphia chain store system, or a wholesale grocer, if they would want to buy goods under their own label, the packer is able to accommodate them and sometimes gets a handsome premium. We do that labelling for the packer and of course are paid for it. We are equipped to do it and we charge a rate which is comparable to Baltimore and Wilmington.

With respect to any arrangements for inspecting goods for any damage which may have been done in transit or otherwise, the practice with respect to canned goods is to draw samples. We, being a disinterested party—a good illustration would be a thousand cases of canned tomatoes. Under the regulations of the Department of Agriculture a disinterested witness can draw one can out of twenty-four cases taken from various parts of the car. These samples are then submitted to a licensed inspector who examines them and grades them and a certificate is issued. This is a protection for the warehousing company and of

course, the bank, and it also enables the canned goods packer to sell that product without any question of Government grade inspection.

We have merchandise stored with us which requires a certain temperature or moisture conditions. There are certain lines of canned goods that you must be careful in protecting against frost damage. We have heated sections where we install recording thermometers and have a check on the temperature twenty-four hours a day. Paper would be a good illustration. A degree of moisture is necessary to protect that product from losing weight. That applies also to wools, cotton knitters and commodities of that kind. Some of our buildings are specially designed for this purpose—specially designed to render service and take care of goods in the manner I have described. For example, Bainbridge Stores is a good illustration. We have what is known there as a mezzanine level where the conditions are wonderful for the storage of paper. That section is much sought after by wool people because the wool won't lose weight. The upper levels of the Bainbridge Stores are wonderful for the storage of heavy weight. It will sustain 550 pounds to the square foot. That compares with what you call your modern buildings of 200 and 250 pounds to the square foot. The purpose we use it for was for the protection of food products from frost damage. We installed heating walls as thick as this desk, designed by the sugar people. It has hardwood floors throughout. That is the old Franklin sugar place.

The fittings and convenient locations of our stores are a very important factor in obtaining customers. River front stores, as an illustration, is the center of the universe for the grocery trade. When the house was designed, you had four or five systems of chain stores at that time. The Acme Tea Company—that

was Mr. Hunter—had its warehouse on Second Street above Chestnut. George M. Dunlap was on Delaware Avenue within half a square of the warehouse. Robinson & Crawford—everybody knows what success he made of American Stores—had a warehouse on Front Street. All wholesale grocers were within a stone's throw of that property; and there wasn't any public warehouse in that part of the city at that time. We got all of that business in those days because there was no competition. There was a decided need for that property at that time. We do not still have that business; that has ceased, I am sorry to say. The Reading Railroad—what do you call that—proselyting? They influenced the American Stores to build on that tract at Willow and Noble Streets; Robinson & Crawford went up on Hamilton Street; they just drifted away from that district; but the wholesale grocers are still there, those that are still in business.

Insurance rates are very important on commodities like wool and canned goods running into money values. If we advanced loans we would carry the insurance and charge the customer. Usually, the customer carries the insurance and pays the bills.

Q. How do your rates compare with those of other warehousing chains?

A. The other warehousing chains?

Q. Yes.

A. The complaint about us from our customers is that we are generally higher.

Our insurance rates, when compared with those of other warehousing chains, are very attractive. They range from a minimum of about 4 cents and then up to a basis of 35 or 40, according to the character of the building and the commodity stored.

When goods come in to our warehouse a very heavy percentage comes by rail. When goods come by rail, the bulk of the freight is unloaded and handled

by our organization. It may come in on either a straight bill of lading or an order bill of lading. The latter is a negotiable instrument. The consignees in the bills of lading are usually the owner, manufacturer, or representative of the manufacturer. Very rarely are we the consignee. The bill of lading usually reads —Consignee's name, Philadelphia, Pa., Pennsylvania Railroad, deliver c/o Merchants Warehouse, River front stores; or if the Pennsylvania isn't the railroad used, the Reading or the B. & O.—Reading or B. & O. delivery. The bill of lading names the store the shipment comes to—river front warehouse or whatever it is. Otherwise the car might arrive in Philadelphia at some other location; and before it would be possible to arrange for its movement to the proper location demurrage charges would accrue. Cars being manifested through to the river front stores or any other of our warehouses, are hauled right there by the Pennsylvania, Reading or B. & O. locomotives—whatever the railroad is. When they get there, that is the end of the journey so far as that shipment is concerned. We unload the car and the railroad hauls it away.

After the goods go on our floor, they are held subject to the instructions of the shipper or owner. They may be delivered within a very short period, or they might go in the warehouse and be held there a long period. Sometimes they are reshipped by rail. When they are reshipped by rail, it is always on a new bill of lading. It starts a new journey, whether it be inside the State or outside the State.

We have no warehouses or property outside of the City of Philadelphia. The person who designates the warehouse to which the goods are to be brought would be either the shipper or the shipper's agent in Philadelphia. The consignee might be the shipper's agent. We have nothing to do with it.

I go out and endeavor to get business and try to get goods shipped into our warehouses. That is my responsibility. There is no secret about the fact that during the time we had this arrangement with the Pennsylvania Railroad I tried to get customers to ship over that railroad. We certainly would try to get people to use the Pennsylvania Railroad. There was never any secret about any of these contracts which were clearly in the public interest. In the proceedings before the Interstate Commerce Commission where it was ruled that we were wrong, the business men that got the benefit of that arrangement and every trade organization in Philadelphia wanted this arrangement. As a matter of fact the railroad published tariff is not stated in these contracts. The arrangement, as far as the railroads are concerned, is still in effect. By that I mean that a very heavy volume of railroad tonnage moving in to Philadelphia at carload rates is still unloaded by the railroad without making any additional charge by the railroads for that service. We don't get paid for doing it any more. The railroads do that at their own stations. We understand that the arrangement is in effect at the Terminal Commerce Building. Now, one has to negotiate with the man who owns the freight for the unloading.

Forty-eight-hour free storage is allowed today at certain of the railroad stations. We are in severe competition with the Reading Railroad station directly across the street from river front stores, which is an illustration. Cars are floated and there is no rail connection from the land side. The freight is unloaded and piled on the platforms or if it is convenient for the consignee to go and get the freight there is no charge. The same arrangements are in effect at certain of the Pennsylvania Railroad river front stations, certain of the Reading and B. & O. pier stations, and all of the perishable fruit and produce that comes to Philadel-

phia is unloaded by the railroads at their terminals. In South Philadelphia a tremendous volume of ocean brought or water brought traffic moving to and from the port—that might be import, export, or coastwise traffic is all unloaded by the railroads without charge. The forty-eight hours free time is practically in existence all along the Atlantic seaboard from Norfolk, Virginia, to Portland, Maine.

I have given a great many figures showing the trend of our business from 1927 to 1933. If I remember those figures, they showed a tendency to go the other way, after the Supreme Court of the United States stopped the practices we have been discussing, that is, to show an increase in the number of our customers and the amount of our business. I think we have made some headway after the arrangement was discontinued.

CROSS-EXAMINATION.

When I said that we have never got below the other warehouses I meant that the combination of our labor and storage charges are comparable with those charged by the other warehouses. Take, for example, the 8 cents a barrel on flour. That rate was established, if my memory hasn't failed, as a result of negotiations with officers and, I think, the Transportation Committee of the Commercial Exchange back in 1918. That was the prevailing rate in Philadelphia at that time. It varied from 8 cents a barrel for certain type products to a maximum of 12 cents a barrel.

Q. Now, if a car of flour came to your warehouse during the contract period, during the period involved in this suit and you unloaded it and sorted it and took it to the tailboard of the trucks of one or a half a dozen customers, and they carried it all away within the forty-eight hours free time, you wouldn't charge them a cent, would you? Just answer the question, and then you can explain it if you wish to.

A. Will you repeat the question?

Q. Please read the question.

(Question read.)

A. Your Honor, may I answer that my own way?

By THE COURT:

Q. You answer the question and then make any explanation you wish to.

A. You will understand he has asked me something that I can't answer.

By MR. WHITE:

Q. Can you say whether or not you charged the customers for that service?

A. There could only be one customer for one carload; you have six customers in there, and you could only have one.

Q. On some carloads distributed to several people?

A. No, sir; they would be distributed to one consignee, one customer.

Q. But they might go to several customers of theirs, might they not?

A. We wouldn't know how many.

Q. But you would receive an order from your customer to deliver so many to so and so; so many to so and so; and so many to so and so, wouldn't you?

A. What we would receive is exactly what the railroad agent would receive; an order from the Quaker Oats Company to make delivery to a team. There is one customer always to a carload.

Q. As I understand, one customer from a carload came——

A. No; it is the party to whom consigned.

Q. Very well; we will say the one to whom consigned in your case, but you might have separated that load into six different parts and deliver to six different people, might you not?

A. It could be an assorted car of six brands, but there could only be one customer; our records would show delivery to only one man.

Q. If you will just answer the question we will get along much faster. Even though you have but one customer, he might direct you to distribute that car to six people, and very often would, wouldn't he?

A. I can't interpret the instructions we receive in that way; we receive instructions from one man, one shipper, one consignee; we couldn't do anything else.

Q. I understand you receive instructions from one consignee, but doesn't he frequently send you orders to deliver, we will say, 500 pounds to this man and 1000 pounds to the other?

A. No; that is a retail business with us; it would be one car to one customer; not 500 pounds or 1000 pounds.

Q. Then you mean to say, do you, that whenever a car of any kind comes into your warehouse and is unloaded, and is by you delivered to the tailboard of a truck, it goes to one person?

A. That is my answer; yes, sir.

Q. That is what you say?

A. Yes, sir.

Q. And it is never distributed to different customers of your customer in Philadelphia?

A. I won't say that; we deliver it to him; I don't know what he does with it.

Q. I guess we will pass that point. Let's assume, therefore, you take this car of flour and unload it, and put it on the platform in your warehouse, and deliver it to the trucks that come for it, and it is all taken away within forty-eight hours free time; you don't charge your customer one cent for that service, do you?

A. Not if it was delivered by the Pennsylvania Railroad under the provisions of this contract, no, sir.

Q. You would not?

A. No, sir.

Q. Therefore, if you charge nothing for the service of unloading the car, say of flour, and then afterwards sorting it and loading it on the trucks, charging nothing for it, you don't call that undercutting?

A. We don't load trucks.

Q. You take it to the tailboard of trucks?

A. Yes, sir.

Q. You don't call that undercutting?

A. How could that be, Mr. White, when the railroad tariffs undertake to render that service; they are performing the service today——

Q. I mean the way I am asking you the question.

A. I am asking you how could it be done?

By Mr. McCracken:

Q. You can't ask Mr. White questions.

A. The answer is it could not be done.

By Mr. White:

Q. The answer is, is it not, as you said in your testimony before the Interstate Commerce Commission, you were paid for that service by allowance from the Pennsylvania Railroad, and therefore you do not charge your customer?

A. I said once before if carload freight was delivered to us under the provisions of that contract, we render the service stipulated and are paid for the service.

Q. By the Pennsylvania Railroad?

A. Yes, sir.

Q. And not by the customer?

A. But this is a service honestly and fairly rendered.

Q. Honestly and fairly rendered, and paid for by the Pennsylvania Railroad, and not by the customer?

A. As provided in the contracts.

Q. That is correct?

A. Yes, sir.

Q. In those figures that you gave us, Mr. Richardson, of the number of cars that came handled through your warehouse in certain years, did you mean in and out, or just in?

A. I mean both in and out.

Q. In and out?

A. Yes.

Q. Mr. Richardson, in the conduct of your business as a warehouseman, frequently cars consigned to your warehouse could not be unloaded within the two days' times allowed by the railroad tariffs, could they?

A. I wouldn't say that could not have been; they probably were not always unloaded in forty-eight hours.

Q. As a matter of fact, as shown by the record which you have seen, I think, which is not in evidence——

A. I haven't seen the records; you have them in your hand.

Q. I thought you had; copies have been furnished your counsel. I will ask you this question: Is it not a fact that there were many instances where cars were detained loaded for as much as twenty-five, and in a few cases, even a hundred days before they were unloaded?

A. I have no knowledge of that. I think there is no question about there being cars detained, but I haven't any personal knowledge of it.

Q. You have never paid any demurrage to the Pennsylvania Railroad for any of that detention, have you?

A. Yes, sir.

Q. Show me where you did?

A. If you have a correct record, you will find coal cars consigned to us on which we had to pay penalties.

Q. You know we are not talking about coal.

A. I am answering your question.

Q. We are talking about package freight.

A. I answered your question as I understood it.

Q. Confining my question to package freight—I am sorry if I have misled you; confine your answer to package freight. Did you ever pay any demurrage to the Pennsylvania Railroad for detention of cars containing package freight?

A. We did not. I think, Mr. White, any fair construction of that contract would clearly convince anyone that any detention, if there was any, was on account of the Railroad Company because of its inability to unload that car. I don't think a fair interpretation of that contract would mean that responsibility was passed on to us. We were only employed to render the same service they were obliged to render at their own stations; that is, to unload the car.

Q. When this record shows, as it does, that there were hundreds and hundreds of car days' detention of cars loaded with package freight on the Pennsylvania Railroad tracks and no demurrage was paid by you, I am asking you if you can point to any term in the contract between you and the Pennsylvania Railroad which frees you from those demurrage charges?

A. As I said once before, I think our responsibility was to only unload the car.

Q. Was there any arrangement made between you and the Pennsylvania Railroad outside of the contracts, that you were to be charged no demurrage?

A. No, sir; those contracts are the only agreements in effect.

Q. Now, sometimes if it was convenient to you and convenient to the shipper you could leave a car loaded with news print, or with bags of cement or flour, or anything, as much as three or four weeks without unloading it, and you didn't have to pay anything for it, did you?

A. Mr. White, I think——

Q. Isn't that true?

A. You can easily eliminate one commodity; cement.

Q. Leave that out; take the other things.

A. I wouldn't see that it would be to our convenience to hold cars on track, because we couldn't make money unless we got the cars unloaded and put the merchandise in the warehouse.

Q. Isn't it sometimes more convenient to unload cars slowly instead of having to put men on it and paying them time and half time to do it?

A. No, sir. During that period you could have easily gotten fellows to work all day and all night if you could have given them the work.

Q. Isn't it sometimes more convenient for your customer to take their products more slowly?

A. I wouldn't say that; our best customers always want cars unloaded; they are always clamoring for us to give them preference.

Q. When does the forty-eight hours free time start?

A. Following the date of unloading.

Q. Following the date of unloading?

A. Yes, sir.

Q. If it didn't suit the customer to take those goods for a week and you left the goods stand in the car a week and then unloaded, he still got his forty-eight hours free time, didn't he?

A. Please repeat that question.

Q. Will you read the question, please?

(Question read.)

A. You are tying me in now with a question that is rather complicated. I can't see that it would ever suit our customers to hold cars on track. I said he was entitled to forty-eight hours free time following the unloading date.

Q. That is what I want, Mr. Richardson. If it is shown by this record here that the cars remained unloaded for a week, let us say, before the time of unloading, and the customer then took the products away within forty-eight hours free time, he had, in effect, gotten a week's storage and unloading, and didn't pay one cent for it, did he?

A. He didn't get his week's storage from us if that car is held on track.

Q. But from the Pennsylvania Railroad?

A. It hasn't reached the destination designated in the bill of lading; we are not liable for that.

Q. He got it whether he got it from you or the railroad, didn't he?

A. The Merchants Warehouse Company isn't the only warehouse company where cars are delayed. Take the last storm, for instance, where the railroads were paralyzed and couldn't move freight; why do you hold us responsible for that?

Q. You say that Mr. Sullivan's company bought a building from you over your head; you meant Mr. Bailey was one of the complainants in the Interstate Commerce Commission case?

A. I understood we are also a defendant in a suit——

RE-DIRECT EXAMINATION.

There has been another suit brought against us by Bailey and I thought it was a joint suit—I thought it was the same thing. I thought Bailey and Terminal was the same thing. There wasn't anything in it for us financially when a railroad car lay on a track outside in our yards and wasn't loaded into a warehouse store. We could not get even the unloading charge. We lose money every day that car lay out there. There was no warehouse money in it for us when the customer took the freight off in the forty-

eight hours free time. We got the same amount for unloading the car whether it was taken away in forty-eight hours or in a year. After a car reached the yards the customer got the freight unloaded free either from us or the Pennsylvania Railroad.

RE-CROSS-EXAMINATION.

I did mean that allowances were paid us on automobiles. I was not mistaken. I do not have the name of the tariff on which allowances are made on automobiles but I have my record and I found we handled in 1917 a great many automobiles and we were paid for the service of unloading them. The Merchants Warehouse Company was paid in 1917 an allowance for automobiles. I have not seen the tariff. I say this allowance must be included in the tariff or we couldn't have been paid it. The accounting department of the Pennsylvania Railroad does not make many mistakes. I have got copies of their bills somewhere. My experience has been they do not need any guards. Those gentlemen are able to take care of themselves. I have copies of the bills rendered for the service of unloading automobiles. We were paid for it.

Testimony of EDWARD W. OESCHER, a witness called on behalf of the defendant, Merchants Warehouse Company.

DIRECT EXAMINATION.

I am vice-president and treasurer of Pennsylvania Warehousing and Safe Deposit Company. I have been connected with that business twenty-four years. Pennsylvania Warehousing and Safe Deposit Company has twenty-two warehouses, made up of different buildings; one warehouse is at Port Richmond, one at Delaware Avenue and Poplar, two warehouses in separate

buildings at Sixteenth and Callowhill, three at Twenty-third and Race, five at Delaware Avenue and Pine, one at Delaware Avenue and Fitzwater, two at Delaware Avenue and Catherine, and one at Fitzwater and Swanson Streets.

Pennsylvania Warehousing and Safe Deposit Company has been in business since 1872 and has been continuously in business that long. It antedates Merchants Warehouse Company. All of its warehouses have been in operation for a long time. During my twenty-four years with the company, we acquired the warehouse at Delaware Avenue and Poplar and the warehouse at Fitzwater and Swanson Streets. They are about the only two warehouses acquired during my time with Pennsylvania Warehousing and Safe Deposit Company.

Pennsylvania Warehousing and Safe Deposit Company does a general warehousing business—the same kind as Merchants and Terminal. Up until May 1931 it had a contract with the Reading Company and also a contract with the Baltimore and Ohio Railroad. All these contracts were in evidence in the case before the Interstate Commerce Commission and run back to 1897 which was the date of the first contract. Witness has and produces the original contracts, which are not all alike. Witness refers to the agreement of December 12th, 1901, between the Philadelphia and Reading Railway Company and Pennsylvania Warehousing and Safe Deposit Company covering the leasing of the Sixteenth Street stores. The contract is rather long and provides for the unloading of general merchandise at the Sixteenth Street stores and the payment to Pennsylvania Warehousing and Safe Deposit Company of thirty cents per gross ton, with the exception of railway traffic coming from the waters of New York or Pennsylvania. This agreement was afterwards supplemented by another agreement cutting

down the payment to fifteen cents per ton on newsprint paper; but the payment of thirty cents per ton was continued throughout the entire contract on general merchandise. Pennsylvania Warehousing and Safe Deposit Company has similar agreements covering the Port Richmond stores and the Delaware Avenue stores and the Poplar Street stores. The December 12, 1901, agreement covers only the payment for unloading from the car; Pennsylvania Warehousing and Safe Deposit Company did not receive anything for loading out.

The Baltimore and Ohio agreement bears the date of April 10, 1897. This agreement was originally thirty-five cents per ton and then it was just unloading. Afterwards it was modified to fifty cents per ton both in and out—both loading and unloading.

These contracts or supplements thereof remained in existence up until May, 1931, when the Supreme Court of the United States' decision came down. They were all involved in that suit. Freight was allowed forty-eight hours for the Reading Railroad and the Baltimore and Ohio Railroad, just as with the Pennsylvania Railroad and Merchants Warehouse Company. Pennsylvania Warehousing and Safe Deposit Company never received any bills for demurrage from any of them.

The floor area covered by the various warehouses of Pennsylvania Warehousing and Safe Deposit Company is a trifle over a million square feet. It was a trifle under a million up to 1924 when Pennsylvania Warehousing and Safe Deposit Company bought the Poplar Street warehouse. We have practically had a million square feet for the past twenty years.

Pennsylvania Warehousing and Safe Deposit Company fixes its rates for storage by competition. The customer negotiates with the company. We have people that go out and solicit.

Q. Is there any such thing as a uniform rate in Philadelphia?

A. Our rates are more or less standardized by competition.

Q. By competition; what can you say as to whether the Merchants Warehouse Company has been a low or a high charger as compared with other warehouse companies?

A. I would say they are about on a par with us; I think we are considered high.

Q. You are not price cutters if you can help it, are you?

A. We have never tried to be.

Q. There is no legal commission that fixes charges; it is all open and free competition, isn't it?

A. The only thing is the Commercal Exchange, you might say; they have come to us on flour which was a large volume of business, and we were more or less obliged to fix it to take care of the Commercial Exchange.

Pennsylvania Warehousing and Safe Deposit Company handles flour, just as Merchants Warehouse Company does; and handles heavy density goods—general merchandise, anything it can get. I believe Pennsylvania Warehousing and Safe Deposit Company did less business than Merchants Warehouse Company during the period in question from 1927 to 1931, judging from the figures which I heard—I am just going by those figures. It does business that comes in otherwise than by rail. It will take any kind of business. Its truck business is substantial. The figures read were just rail figures.

The most important factors that I find from my experience in getting business and a man's determining what warehouse he wants to use are service and location. We have always stressed service. Our company has been built up on service. It has cost us a

lot of money, and we still continue to do it; service has been our main talking point since I have been with the company. Location, of course, is quite a factor; that is the reason we distribute the warehouses in different sections of the city.

These two factors are more important than price. As I say, there is many a time that we will get higher rates from a customer for merely service; we have found that time and time again. We determine that we are getting a higher rate when somebody comes and tries to underbid us and the customer stays with us.

It is pretty hard to tell, due of course to general business conditions, what was the effect upon our business of the cessation of these contracts of the Reading Railroad in 1931; but my judgment would be that we have not lost any business—we have increased. Yes, increased; but, as I say, it is hard to tell on account of general business conditions. Now we charge the unloading of cars to the customer. The customer is willing I think to pay for service. We don't give the forty-eight hours free time any more. We get paid for unloading. It is a fact that the customer can get forty-eight hours free time at a railway station; and I understand he can get free unloading service at a railroad station.

CROSS-EXAMINATION.

The allowances from the Reading Railroad to the Pennsylvania Warehousing and Safe Deposit Company were less than the allowances from the Pennsylvanio Railroad to the Merchants Warehouse Company. All these years we knew they were less. I don't recall Pennsylvania Warehousing and Safe Deposit Company going to the offices of the Reading Railroad and telling them it could not get along unless the railroad made it an allowance as big as the Pennsylvania was paying

the Merchants. I did not go to see them about it. I am pretty sure of that. No, we did not think we were not getting treated quite right because our allowances were not as big as the Merchants were getting. No, I wouldn't say we thought we were being put at such a disadvantage it was hard for us to compete. We didn't have any trouble; of course, we would like to have more revenue.

Q. As far as heavy density business is concerned, they could take that away from you if you didn't have allowances, couldn't they?

A. What stopped the other fifteen or twenty warehouses from doing it?

Q. Did they get it?

A. Yes, some of them.

Q. How much?

A. I couldn't answer that question.

Q. Now, Mr. Oescher, you know perfectly well, don't you, that the Merchants Warehouse for the Pennsylvania, and you for the Reading had practically all the heavy density?

A. No, I do not know that.

Q. You know they had the great bulk of it, don't you?

A. No, sir.

Q. You don't know that they didn't?

A. No, sir.

Q. You disclaim any knowledge on that subject; now, who else is there in your company who would undertake to discuss this question with the Reading Railroad?

A. It would probably be our former—one of our former vice-presidents. If you have the year, I could probably tell you.

There may have been some letters passed between Pennsylvania Warehousing and Safe Deposit Company and the Reading Company in which we com-

plained we were not allowed as heavy an allowance as Merchants and it put us at a disadvantage; I don't recall, it is so long ago. I will look at our files and see if I can find some letters in which we said to the officers of the Reading Railroad if we didn't get a higher allowance we couldn't hold up our end with the Merchants. I will bring that file with me tomorrow morning.

Cross-examination of witness discontinued, to be resumed. The following day, the cross-examination of the witness was resumed.

I have found three letters relating to the rate of payment made by the Reading Company to the Pennsylvania Warehousing and Safe Deposit Company for handling news print paper, which originally was 30 cents a ton and was subsequently reduced to 15 cents a ton, and which we tried to get the Reading Company to restore to the original amount. One of these letters is dated March 7, 1922, and another January 27, 1922. They are addressed to Mr. Hilleary, freight manager of the Philadelphia and Reading Railroad Company, from our company. The third is dated February 3, 1908, addressed to the general freight agent of the Philadelphia and Reading Railroad Company from our company.

(The three letters in question were put in evidence and marked Plaintiff's Exhibit No. 21.)

The letter of March 7, 1922, is, in part, as follows:

"As the Merchants Warehouse Company has been handling cores for our customers at $1.00 a ton, the Pennsylvania Railroad has been receiving the benefit of these shipments. It has, therefore, become necessary, to keep our customers satisfied and retain the business, for us to handle cores for but two Mills, and this expense will probably be increased at any time.

In the face of all this, we have to compete with a competitor that was receiving on my last information, 50¢ both in and out, or a charge of $1.00 in such cases, whereas we are receiving but 15¢ on the handling of paper, depriving us of all flexibility or power to meet situations in competition with them, and, in our judgment, almost fatally handicapping both the Reading and ourselves in getting and retaining business. We have a very large capital involved, and have had to depend upon it largely to enable us to continue at all under present conditions, with great responsibilities and risks that may meet us at any time.

. . . It is, therefore, our strong hope that the present situation will appeal to both the judgment and fairness of your company."

Q. That was explaining the competitive situation which your company met or felt?

A. That's the argument we used to get the restoration of the 30 cents a ton.

Q. Did you get a higher allowance as a result of that explanation?

A. No, sir.

RE-DIRECT EXAMINATION.

This (indicating) is an advertisement we inserted in the *Evening Bulletin* under date of June 25, 1931, after the decision of the Supreme Court, terminating our contract with the Reading Company, was handed down.

(The advertisement in question was put in evidence and marked Defendant's Exhibit No. 2.)

The payments made by the Reading Company to the Pennsylvania Warehousing and Safe Deposit Company for unloading freight, were smaller in amount than the actual cost of the service.

RE-CROSS-EXAMINATION.

In the advertisement dated June 25, 1931 (Defendant's Exhibit No. 2) we said that we would continue unloading and delivering freight to our customers within forty-eight hours of the arrival of the freight without making any charge to our customers for this service. This freight service has since then been discontinued.

(The following contract was offered in evidence and marked Defendant's Exhibit No. 3, not to be copied in the record: Contract bearing date the 10th day of April, 1897, between the Pennsylvania Warehousing and Safe Deposit Company and Baltimore and Ohio Railroad Company, and providing for certain service charges to be paid by the Railroad Company.)

(The following contract was offered in evidence and marked Defendant's Exhibit 4, not to be copied into the record: Contract bearing date the 12th day of December, 1901, between the Philadelphia and Reading Railroad Company and the Pennsylvania Warehousing and Safe Deposit Company.)

Testimony of JULIEN L. EYSMANS, a witness called on behalf of the defendant, Pennsylvania Railroad Company.

DIRECT EXAMINATION.

I am vice-president of the Pennsylvania Railroad Company and have been with that company since prior to 1917. I have been assistant general freight agent, general freight agent, general traffic manager, vice-president in charge of traffic and vice-president and assistant to the president, which is my present

position. During the time specified, the traffic coming over the Pennsylvania Railroad to the warehouses in Philadelphia has been under my general charge and supervision, and the solicitors for shipments over the railroad coming into Philadelphia were under my general direction. I am familiar with the contracts, which are in evidence, between the Pennsylvania Railroad Company and the Merchants Warehouse Company in regard to the service charges at the warehouses of the latter company. The earlier charge under those contracts was 35 cents a ton, and it was subsequently increased to 50 cents a ton.

The increase was made under the following circumstances. About May of 1919 the Merchants Warehouse Company protested that the labor expenses were increasing to such an extent that the company could no longer carry on our agency work and perform the service for the account of the railroad company without getting an increased allowance. The officers of the warehouse company made these representations to me personally and to higher officers at that time. The railroad company, however, declined to make any increase.

I have here a communication dated May 29, 1919, on the letterhead of the United States Railroad Administration, Director General of Railroads, Pennsylvania Railroad, Eastern Lines, and some other roads. Subject: Increased loading and unloading allowance to Merchants Warehouse Company from 35 cents to 50 cents per ton, CHM 5-26, which reads as follows:

> "Respectfully referred to Mr. G. D. Ogden, Freight Traffic Manager for the necessary arrangements. Elisha Lee, Federal Manager."

This is a communication received in the ordinary course of business, with Mr. Lee's signature to it.

I have also here a letter under the letterhead of the United States Railroad Administration, Director General of Railroads, C. H. Markham, Regional Director, addressed to Mr. Elisha Lee, Federal Manager, Pennsylvania Railroad, Philadelphia, subject: Unloading allowances to Merchants Warehouse Company, Philadelphia. This letter reads as follows:

"Dear Sir:

I enclose copy of my letter of this date to Mr. Chambers respecting allowances to the Merchants Warehouse Company. Please arrange for prompt changes in your tariffs in accordance therewith.

Yours truly,

C. H. Markham
Regional Director."

C. H. Markham had been vice-president or had been president of the Illinois Central Railroad at Chicago. When the Federal Administration took over the railroads, he went to Atlanta as a regional director of the southeastern railroads and later he was transferred by the Government to Philadelphia to take charge of the Allegheny region, comprising the Baltimore and Ohio, the Philadelphia and Reading and the Pennsylvania and other railroads in this territory. Mr. Markham was not an officer of the Pennsylvania Railroad Company, and had never been connected with it. He was selected by the Government to take control of this and other railroads during the War.

I have here also the copy referred to in the above letter and enclosed with it. It is also on the letterhead of the United States Railroad Administration, Director General of Railroads, Allegheny Region, Broad Street Station, Philadelphia, and is dated May 26, 1919, subject: Unloading allowances to Merchants

Warehouse Company, Philadelphia. It is addressed to Mr. Edward Chambers, Director, Division of Traffic, Washington, D. C. (Mr. Chambers was Director of Division Traffic for Mr. McAdoo in the Federal Administration of the railroads.) This document comes from the files of the Pennsylvania Railroad. It reads as follows:

"Dear Sir:

Attached is copy of section 5 of contract between the Pennsylvania Railroad Company and the Merchants Warehouse Company.

In accordance therewith, the Merchants Warehouse Company, under date of January 28, 1919, served formal notice upon the Pennsylvania Railroad Company, the Regional Director and Federal Manager Lee. The copy of one of these notices is enclosed herewith."

Q. We haven't been able to find that notice?

A. No; because that went into the files of the Administration at Washington, and of course we, as a railroad, had no access to the Government files.

Q. It was sent by the Regional Director to Washington, D. C., and it remains in their files and not in ours?

A. Yes, sir.

Q. "After consultation with Mr. Geo. Stuart Patterson, counsel of the Pennsylvania Railroad"——

MR. WHITE: Pardon me, Mr. Barnes. Did I understand you and Mr. Eysmans to say that the data and communications, on which that letter was based, are not available to you?

MR. BARNES: Not the data, no. The notice, which is referred to in that letter, was not sent to us and is probably in Washington.

MR. WHITE: I have not objected, if the Court please, but it is, in effect, a communication passing between two officers, and I think that that letter should not be read, unless we have the gentleman here who wrote the letter, including the claims and the pleas made by the Merchants Warehouse Company at the time.

MR. BARNES: That copy is probably in your possession.

MR. WHITE: No; I don't think so.

MR. BARNES: Well, you had better look. We haven't got it.

MR. WHITE: No; we do no have it.

MR. BARNES: We haven't got it.

MR. WHITE: Then, I think I must object to having the letter read, if the Court please, or offered in evidence.

THE COURT: That letter, as I understand it, is not in evidence yet. I think the objection to the contents of the letter not being known until it is in evidence is well taken.

MR. BARNES: Then I offer the letter in evidence, if the Court please.

MR. WHITE: I object to it, because it is obviously a letter based on data and communications submitted to that writer, and I do not think that the letter ought to go into evidence without the supporting data on which the writer acted.

MR. BARNES: In the first place, if the Court please, we haven't got it; and in the second place, the purpose of offering the letter is to show that we acted under the instructions of the Government. The railroad company was directed by the Government to take certain action.

THE WITNESS: May I say a word?

MR. BARNES: No; not now, Mr. Eysmans.

MR. WHITE: If the Court please, here is a letter written by a director or some official appointed by the Government at the time to supervise conditions in this section of the country. Now, a letter like that written by an official at Washington of course—as is already indicated by Mr. Eysmans' testimony—would be based on some representations made to him and upon data and claims submitted by the Merchants Warehouse. Now, I should say that we should have the communication and the data before we put in the reply.

THE COURT: To my mind that does not touch the real purpose of the offer. The action here is against two people for having entered into a combination for a certain purpose.

MR. WHITE: Yes; that's right.

THE COURT: This letter is directed, I assume, to the proposition that what was done was done by direction of the Regional Director or whatever his title was, and was really no act of the defendants.

MR. BARNES: That is so, your Honor. Your Honor is quite right.

MR. WHITE: But if your Honor please, may I say, however, that it is of course well understood that these officials appointed by the Government had to act upon the representations and upon the information furnished them by the regular officers of the road who remained in charge, subject to the general supervision of the Director General and his office.

THE WITNESS: I just said a moment ago that we refused to increase the allowance, and we were compelled to do it by the Government.

MR. WHITE: You have not been asked a question, Mr. Eysmans.

Therefore, it seems to me, if the Court please, that if one of these officials who is acting in the capacity indicated, writes a letter saying we consent to so and so, or we direct so and so, the jury and the Court are entitled to have that communication that went to him. Certainly it could be found somewhere.

(Objection overruled. Exception noted for plaintiff by direction of the Court.)

MR. WHITE: Does your Honor allow the letter as to its contents, or simply the fact as to what it is directed?

MR. BARNES: I offer the letter in evidence.

THE COURT: Supposing you state for what purpose you offer it, Mr. Barnes?

MR. BARNES: I offer the letter in evidence to show that an application having been made to the railroad for an increased allowance, it was refused by them, and that then a subsequent application was made to the Federal authorities, under this contract with the railroad by which the allowance was made, and the railroad was ordered to increase it, and the purpose of that evidence is to show that there is no ground for the allegation of conspiracy, that there was no conspiracy, that these actions in these matters were taken in this particular instance under the direction and the orders of the railroad administration, whom we were compelled to obey.

THE COURT: I will admit the evidence, limited to that purpose; that is, to show that this particular act of increase of thirty-five cents to fifty cents was done in pursuance of any active conspiracy between the defendants or whether it was done because the Government had so directed.

(Discussion off the record.)

MR. WHITE: I will withdraw my objection, if the Court please.

By MR. BARNES:

Q. After consultation with Mr. George Stuart Patterson, counsel of the Pennsylvania Railroad, it was decided to advise the Merchants Warehouse Company that the Administration would not arbitrate the question, but would discuss with it the proper adjustment of the matter. After several conferences, it has been agreed to increase the thirty-five-cent loading and unloading allowance to fifty cents per net ton, same to become effective as soon as tariffs can be issued, the question of retroactiveness to be left for further consideration. The Pennsylvania Railroad has been instructed to revise its tariffs accordingly.

"In view of the unusual nature of this contract and the fact that it is costing the railroads from sixty cents to sixty-four cents per ton to perform exactly the same service at Cupples Station, St. Louis, I am sure you will find this adjustment of the matter satisfactory." Now, I understand you to testify that this is the letter referred to in Mr. Markham's letter to Mr. Lee, whom you stated is no longer living?

A. Yes, sir.

(The three letters in question were offered in evidence and marked Defendant's Exhibit No. 5.)

THE WITNESS: In accordance with that order and instruction of the Federal Government, the rate of

payment to the Merchants Company by the Pennsylvania Railroad Company was increased from thirty-five cents to fifty cents per ton, effective June 22, 1919.

During the period in which I had general supervision, control and knowledge of this traffic, there were a number of decisions and orders made by the Interstate Commerce Commission bearing upon the question of the warehouses being stations for the railroad companies. One of these was the Keystone Warehouse Company case at Buffalo, New York, decided on May 19, 1919, and reported in volume 53 I. C. C. 355. Another was Keystone Warehouse Company of Philadelphia, decided by the Commission on July 27, 1923, reported in volume 73, I. C. C. 273. Another was the McCormick Warehouse Company case of Baltimore, Maryland, decided on January 12, 1925, and reported in volume 95, I. C. C. 301. I knew of these decisions when they were handed down and in my judgment they justified our continuing the contracts between the Pennsylvania Railroad and the Merchants Warehouse Company.

The arrangement between the railroad and the Merchants Warehouse Company was well known to the Interstate Commerce Commission. Agents and inspectors of the Interstate Commerce Commission who came every few months to look at the books of the railroad were familiar with these contracts and never made an objection to them.

Q. And how long did that continue, that inspection?

A. Well, I would say up to the time of the decision of the Interstate Commerce Commission.

They did not require the railroad to cancel the contracts. The contracts were continued while the Government was in control of the railroads and afterwards up until the decision of the Supreme Court in

1931, affirming the order of the commission which required the cancellation of the contracts.

CROSS-EXAMINATION.

I came to the railroad in 1891. I was in the freight department from the beginning. The warehouse company made certain representations that the price of labor had gone up and wanted the payments from the railroad increased. When this increase was refused by me and other officers of the railroad who were in fact at that time lower officers of the Federal Administration, they applied to higher officers of the Federal Administration in Washington for arbitration under the terms of the agreement.

Q. Now, Mr. Eysmans, I believe you said the effective date of this order was June 22, 1919; is that right?

A. Yes, sir.

Q. When did Federal control end?

A. March 1, 1920, I think it was.

Q. That railroad has then been in entire control of its officers since March 1, 1920, has it not?

A. That is correct.

Q. Therefore, there was a period of some eleven years after the railroad was restored to the control of its officers and the Government had nothing more to do with it, when you could have abolished or revised or changed these various matters covered by this suit or contemplated by this suit, if you had desired to do so; was there not?

A. Yes; we could have made an effort in that direction.

Q. Also, there were a number of new contracts made during that period, were there not, covering this same service to the Merchants Warehouse Company?

A. There were renewals of the contracts that perpetuated the fifty-cent rate.

Q. I think there were at least three?

A. Maybe.

Q. Made in 1922, and 1925 and 1927, were there not?

A. That's my recollection of the dates; yes, sir.

When the Interstate Commerce Commission ordered the railroad to stop making the payments to the Merchants Warehouse Company under the contract, the railroad did not object to the decision and took no appeal. The appeal was taken by the warehouse company. It never occurred to me that the arrangement between the railroad and the Merchants Warehouse Company was illegal until the decision of the Supreme Court.

Mr. Sullivan never called on me to tell me that the arrangement between the railroad and the Merchants Warehouse Company was damaging to his business and I never discussed with him the question of illegality or any other phase of the arrangement. He never asked me to discontinue the arrangement. I do not know whether he wrote letters to our department on the subject or spoke to someone else.

Q. I call your attention to the contract dated July 28, 1927, which is already in evidence as a part of Plaintiff's Exhibit No. 1, I think it is, which reads as follows—this is on page 98:

> "provided, however, that the Railroad Company shall have the right to cancel or abrogate this agreement and/or the payment of allowances provided for in this paragraph in the event such action is authorized, permitted or required by any order, decision or law."

A. I am familiar with that clause; yes, sir.

Q. Now, does that change your mind or refresh your recollection as to your having considered the

question of the legality of the contracts certainly as far back as 1927?

A. No, sir; it never changed my mind that the arrangement was not perfectly legal.

Q. You didn't have any doubt in your mind that the payment of these allowances would create any undue prejudice or preference and that they might be cancelled?

A. You must understand that the railroad company had many contracts with the agents to perform services that the railroad companies are required to perform under its published tariffs, as, for instance, lighterage arrangements, allowances to plant facilities, and all those sort of things; where the plant spots cars and takes up the work that the railroad agrees to do under its published tariffs. Now, we have to protect ourselves in all those arrangements so that in case of a decision of the Court the contracts are cancelled; that is, those features of the contract.

Q. I wonder if you could tell us what you meant when you put in the contract a suggestion that these payments or allowances might be held to create undue prejudice or undue preference; against whom undue prejudice or undue preference?

A. I don't know, sir.

Q. You must have meant something by those words.

A. Anything that wasn't in the public interest——

Q. They could only create undue preference and undue prejudice against other warehouses, couldn't they? Can you think of anybody else that might suffer by reason of that arrangement?

A. Oh, yes; there might be somebody else suffer.

Q. Who?

A. I can't tell. We made a clause there that carried out—that covered every contingency that might arise. In other words, we were protecting ourselves

against the Merchants Warehouse Company in case we should ever voluntarily want to cancel the contract or in case of some Court or the Commission's decision. We wanted to protect ourselves in every direction against any claim of the Merchants Warehouse Company.

RE-DIRECT EXAMINATION.

When in May, 1931, it was finally decided that these allowances and payments were improper, the railroad cancelled its contracts with the Merchants Company.

Q. Now, you said you called on Mr. Sullivan to discuss with him certain practices you had heard of between the Reading and the Terminal. When was that call; about when?

A. The call was, my recollection is, the early part of 1933 or the latter part of 1932. It wasn't very long after the new warehouse of the Reading had been built; a few months afterwards.

Q. What were the practices that you and Mr. Sullivan discussed at that meeting?

A. Well, allowances. We had understood that the Reading Railroad was paying them certain allowances up there.

Q. At that time?

A. At that time, and I wanted to make sure just what this arrangement was.

Q. What information did you get from Mr. Sullivan on the subject?

A. I don't recall distinctly, sir, but I think that there were certain changes made after that call.

Q. Yes; but what information did you get from him as to what had been done before you called on him —after 1931?

A. The Reading Railroad had employed Mr. Sullivan——

MR. WHITE: Wait a minute. The question is what information did he have that led him to call on Mr. Sullivan.

MR. BARNES: No; it isn't that, but what information did he obtain from Mr. Sullivan as to what was going on.

MR. WHITE: All right.

THE WITNESS: Well, as I understood the arrangement, as it was explained——

By MR. BARNES:

Q. Made by Mr. Sullivan to you?

A. Made by Mr. Sullivan to me; that they were acting as an agent for the Reading Railroad in unloading certain freight for the Philadelphia and Reading Railroad.

Q. And anything said about the payments?

A. Yes; but I don't recall the amounts.

Q. The amounts, but whether anything was said about making payments to the Terminal for that service?

A. Yes, sir.

Q. Mr. Sullivan said that to you?

A. Yes, sir.

Q. That they had been receiving such payments?

A. Yes, sir; that's my recollection.

Q. And that was after the decision of the Supreme Court in May, 1931, holding that such payments and rebates were illegal?

A. Yes, sir.

MR. WHITE: That question is certainly improper. It attempts to characterize something that the witness has not even indicated.

THE COURT: The witness has answered the question, and you are objecting to it.

MR. WHITE: Read the question.

(Question and answer read.)

THE COURT: The witness has already answered it.

(Discussion off the record.)

Testimony of CHARLES J. QUINN, a witness called on behalf of the defendant, Pennsylvania Railroad Company

DIRECT EXAMINATION.

I am division freight agent of the Pennsylvania Railroad Company in Philadelphia and have held that position since March 1, 1929. Prior to that time, I was southeastern freight agent at Atlanta, Georgia. I am directly in charge of the solicitation of freight, and have seventeen solicitors under me whom I supervise. They solicit all commodities coming in or moving out of Philadelphia.

Q. For what purpose?

A. For securing revenue for the Pennsylvania Railroad.

Q. To get freight over the Pennsylvania Railroad?

A. Right, sir.

Q. Have your solicitors anything to do with the warehouses?

A. They are soliciting freight for the Pennsylvania; freight goes to all the warehouses if it is warehouse freight.

Q. And not to any particular one?

A. No, sir.

CROSS-EXAMINATION.

Q. You especially solicit freight, or you did during this period to go to the Merchants Warehouse?

A. I would not say we would especially solicit for the Merchants. We were soliciting for the Pennsyl-

vania Railroad, but its destination would be the Merchants Warehouse Company.

Q. You have seen this paper offered in evidence entitled "Facilities of the Pennsylvania System," marked Plaintiff's Exhibit No. 3, haven't you?

A. No; I don't think I have. I was in the South at that period.

Q. Haven't you ever used that in your solicitation?

A. No; really, I haven't, sir; not personally.

Q. Have your solicitors used that?

A. I wouldn't be able to say whether they did or not.

Q. You heard somebody say on the stand that they did?

A. That may be, but, you see, my experience in Philadelphia goes from 1929.

Looking at this pamphlet, which you have now handed me, I do not see advertised in it any warehouse in Philadelphia except the Merchants Warehouse.

Testimony of ALFRED WILKINS, a witness called on behalf of the defendant, Pennsylvania Railroad Company.

DIRECT EXAMINATION.

I am a freight representative of the Pennsylvania Railroad and have held that position since November 1, 1913. I call on various members of the trade in Philadelphia for the solicitation of business for the Pennsylvania Railroad. I specialize in the solicitation of the automobile business. The automobile business that I got in soliciting freight for the Pennsylvania Railroad went to the warehouse at Delaware Avenue and Fairmount Avenue.

Testimony of MILTON FREEMAN, a witness called on behalf of defendant, Pennsylvania Railroad Company.

DIRECT EXAMINATION.

I am a freight representative of the Pennsylvania Railroad Company under Mr. Quinn's supervision. I am one of the representatives that he spoke of as solicitors. My solicitation is local, in and around Philadelphia, to secure business for the Pennsylvania Railroad. I have never made representations or suggestions about any warehouses.

CROSS-EXAMINATION.

In soliciting freight, I have never used the pamphlet entitled "Facilities of the Pennsylvania System," offered in evidence and marked Plaintiff's Exhibit No. 3. I have been soliciting for the railroad since October 16, 1925. I sometimes call on the local representatives of manufacturing concerns in other cities. I know that if the freight is shipped to the Merchants Warehouse, it must go over the Pennsylvania Railroad. I never called that matter to the attention of my customers. I leave it entirely to the receiver to determine where he wants to do his business. I never suggested any warehouse to any of them.

Testimony of EDWIN T. CARPENTER, a witness called on behalf of defendant, Pennsylvania Railroad Company.

DIRECT EXAMINATION.

I am a freight representative of the Pennsylvania Railroad Company in Mr. Quinn's department and have held this position since October 1, 1926. I solicit freight for the Pennsylvania Railroad in the City of Philadelphia. For five years I have specialized in

flour, grain, hay and straw for domestic service. In soliciting freight, we are in competition with the Reading and the Baltimore & Ohio Railroads. I try to get the business for the Pennsylvania Railroad against them. I have very little, if anything, to do with the warehouses. The consignees and shippers usually have their warehouse picked out before we attempt to solicit the business. I would say that the major part of the flour commodity is distributed between the Merchants and the Pennsylvania Warehousing and Safe Deposit Company. The consignee indicated where it should go.

CROSS-EXAMINATION.

Q. Suppose you went to a man who warehoused in the Pennsylvania Warehousing Company, you know that would probably go over the Reading?

A. Yes, sir.

Q. Would you speak to him and tell him that it would be a good thing to put it in the Merchants Warehouse?

A. No, sir.

Q. You didn't?

A. No, sir.

Q. What would be the use of soliciting their business if he was going to continue to send it over the Reading?

A. We solicit his intermediate haul. Coming from the West, we endeavor to get the Pennsylvania long haul.

Q. Yes! But when it came here, who would put it in the warehouse?

A. When it came here, it would be placed in the warehouse by local consumption. We have nothing to do with that.

Q. When it went to the Pennsylvania Warehousing and Safe Deposit Company, or whatever it was, you knew it was going on the Reading?

A. Yes, sir.

Q. Did you suggest any other way?

A. We suggested the Pennsylvania long haul, but if they insisted upon the Pennsylvania Warehousing and Safe Deposit Company, we were out of it altogether.

I have never seen this pamphlet marked Plaintiff's Exhibit No. 3. In the course of my solicitation of freight, my activities were centered mostly in the Commercial Exchange calling on grain brokers and flour brokers. I called on Mr. George M. Warren, a grain broker, who deals in grain shipped as a commodity and not as package freight. I also called on representatives of the large milling companies in the West, such as the Northwestern Consolidated, of which Mr. Meredith was manager. Mr. Meredith has been a witness in this case. He warehoused some of his flour with the Merchants Warehouse Company. Of course, he didn't store the whole amount in the Merchants Warehouse. If his brokers or shippers stipulated other warehouses, he had to send it there. I also called upon Mr. Roy Purchase, who was then with the Commander Milling Company. He has since died. Some of the others I called upon are still living but are no longer connected with the companies that I made contact with. I believe they warehoused at Front and Federal at Merchants Warehouse.

Testimony of CHARLES EDWIN WEBB, a witness called on behalf of the defendant, Merchants Warehouse Company.

DIRECT EXAMINATION.

I am a wool merchant. My company is the Charles J. Webb Sons Company. Our place of business is 116 Chestnut Street, Philadelphia. Our company owns what

is known as the Webb Warehouse of the Merchants Warehouse Company, which we leased to the Merchants Warehouse Company. In turn we lease the three top floors of that warehouse from the Merchants Warehouse Company, to store wool there, sort it and grade it. We have been doing business with the Merchants Warehouse Company since about 1917. We also do business with the Pennsylvania Warehousing and Safe Deposit Company on South Delaware Avenue, and with the Rex Warehouse in the northeast section.

In choosing a warehouse to do business with, we have to consider the adaptability of the warehouse and its accessibility, both. We have to have light, and we have to have certain conditions which a warehouse has to fulfill in order for us to store wool there. For example, when wool comes in, we don't like a too dry warehouse. We sort wools in the Pennsylvania Warehousing and Safe Deposit Company when the wools don't have to be graded and we don't need any light. Where the wool simply has to be sampled, we put it down in the Pennsylvania Warehousing and Safe Deposit Company, where it has to be graded, we put it in the Merchants Warehouse—that is in our own Webb Terminal. We have skylights there and we can see to grade it and manipulate it.

When I spoke of the accessibility of a warehouse, I meant accessibility to our customers. We have to take our customers very often to look at the lot in bulk, and if the warehouse is inaccessible and too far away, it is difficult to get the man to go there.

I was not familiar with the contracts between the Pennsylvania Railroad and the Merchants Warehouse Company until recently, nor was I familiar with the free loading and unloading, nor the forty-eight-hour free storage services of the Merchants Warehouse Company. We never knew anything about them, and they had no bearing on our choice of that warehouse.

We have got very satisfactory service from the Merchants Warehouse. Service has a great deal to do with the choice of a warehouse, because we always like quick deliveries of our materials. It is not a standard article that we handle, and we are always anxious to get it in and grade it and offer it to the customers, and until we get hold of it we can't do anything with it.

Q. Did you ever take advantage of the fact that cars might lie upon the siding without demurrage?

A. No; we don't like demurrage. We like to get it in as quick as possible.

Q. That feature does not enter into your business?

A. No, sir.

The offices are about a block away from the main building. There is also the question of insurance. Some warehouses have a lower fire insurance rate, particularly the one we are in, which has, I think the lowest rate in the city.

We use the various railroads. We would not care to have all our wool come over one railroad, because we want to take advantage of the transfer shipments. Very often our customers in other states and other cities ask for Reading or some other delivery. We have wools coming over all railroads, from the Great Lakes and the Lehigh Valley and the Reading, and the Belt Line. We are the largest wool shippers in this vicinity.

CROSS-EXAMINATION.

We own the building, known as Webb Stores, in which the Merchants Warehouse Company conducts its warehouse business. We have the three upper floors.

Q. And when your wool comes in, it is unloaded and elevated to the three floors and put up there for your subsequent use?

A. It is for the space we pay.

Q. How much do you pay?

A. I couldn't tell you the exact rate.

Q. Do you pay anything for it?

A. Yes, sir.

Q. You do?

A. Yes, sir.

Q. Can you tell us how much?

A. I don't have that just now, but we have always paid a charge for the service, for trucking our wool around and delivering it on the floors.

Q. I am not talking about trucking your wool around.

A. And for delivering it to the floors. It is no good to us on the first floor, because that's only an unloading platform.

Q. Have you until recently paid anything at all for that service?

A. I think we have always paid for that service.

Q. You think you have always paid for that service?

A. I am sure we have always paid for it; yes, sir.

Q. But you don't know how much?

A. No; I don't. I could very easily find out.

Q. Did you say or did you not say that you have had cars of wool delayed on the tracks for more than forty-eight hours?

A. I don't quite understand that question.

Q. I am asking you whether it frequenly has occurred during the period that we are discussing from March, 1926, until April, 1931—whether during that period it frequently occurred that cars of wool to be delivered to you remained unloaded for a period in excess of three days?

A. Well, if they were, it wasn't to our knowledge. We always wanted to get the cars in as fast as we could.

Q. Just leaving that out for the moment, whether they were or not, since you say you do not know, did

you ever pay any demurrage on cars detained during those periods?

A. I don't think so.

Q. You know you did not?

A. No; I don't know. I don't keep the books and I don't know. I can't follow those small details.

Q. Now, Mr. Webb, there is already in evidence a schedule—I am looking at Schedule A-3, from the records of the Pennsylvania Railroad, showing detentions of cars as follows, and I will ask you if you recollect—C. J. Webb Sons—this is all in July of 1927, which I am reading now—C. J. Webb Sons, eight days, C. J. Webb Sons, eight days, C. J. Webb Sons, five days; these are days more than three days; C. J. Webb Sons, seven days; six cars right there; C. J. Webb Sons, seven days; C. J. Webb Sons, nine days; C. J. Webb Sons, eight days, two cars; C. J. Webb Sons, six days; C. J. Webb nine days, C. J. Webb, ten days; seven, eight, seven, six, twelve days, fifteen days, eight days, thirteen days, thirteen days, fourteen days, nine days, and then, again, nine and nine all on one page, and many, many others of that same character. That is all in evidence. Now, do you remember those cars being delayed like that?

A. No, sir.

Q. Were you in business in 1927?

A. Yes, sir.

Q. But you do know that you didn't pay any demurrage on it?

A. I am not sure. You see, I don't follow all those intimate details of the business to that extent; it would not be possible for me to do it. Now, it would be easy to look that up.

Q. Will you please look up your records, and tell us whether you have paid one dollar of demurrage for all these cars recorded in this statement taken from the records of the Pennsylvania Railroad?

A. If those cars were held up, it wasn't any request of ours, because we always want to get them in.

Q. Does it not occur sometimes that you are full on those three floors?

A. Then we sort on the first floor.

Q. Then you have to pay storage for the first floor?

A. Yes, sir.

Q. But if you stored it in the car for sixteen days, you would not have to pay it?

A. Certainly not.

RE-DIRECT EXAMINATION.

Q. But you say you didn't want to hold it in the cars?

A. No. We want to get it out of the cars, because our commodity is not a uniform commodity; we have to see it.

Q. Did you ever in your whole experience down there ever request that a car be delayed and not be unloaded?

A. No, sir.

Testimony of F. H. FRICK, a witness called on behalf of the defendant, Pennsylvania Railroad Company.

DIRECT EXAMINATION.

I am assistant to the comptroller of the Reading Company and I am familiar with the statistics of that company.

Witness was shown by defense counsel a sheet containing certain figures of the record of tonnage and number of carloads of goods carried over the various railroads which serve Philadelphia to and from all public warehouses in Philadelphia. The statement of tonnage and carloads carried over the Reading Com-

pany's lines to and from the various warehouses in Philadelphia, was compiled under the direction and supervision of the witness from original records of the Reading Company.

CROSS-EXAMINATION.

Q. What did you include in these calculations; what kind of freight?

A. All freight received from the warehouses and delivered to the various warehouses, as shown there.

Q. All freight of every kind?

A. Yes, sir; carload and less than carload.

Q. Now, what did you include in the delivery to the Terminals Warehouse Company? Did you include the freight delivered to the Terminal Commerce Building?

A. We have a separate statement for that; yes, sir.

Q. And this statement is just the Terminal Commerce Building and it is——

A. The Terminal Commerce Building started in 1930.

Q. This relates to freight of all kinds delivered?

A. Yes, sir.

Q. Now, that includes automobiles, of course?

A. Yes, sir.

Q. Automobiles are not rated as package freight by the tariffs, are they?

A. I am not familiar with the tariffs.

Q. Does it include any bulk freight?

A. Yes, sir.

Q. Does it include liquids in tank cars?

A. I wouldn't say so.

Q. You wouldn't say so?

A. I don't know; that is, I do not have the detailed statements here.

Q. Well, it may be?

A. I wouldn't say.

Q. But it does include some bulk freight?

A. Yes.

Q. Have you the statement before you? Look on page 4, please, of your statement, for 1930. I see you have marked here "Reading" and a star, saying that this includes B. & O. as well as Reading, 195 cars going in or out of the Merchants Warehouse Company.

A. We didn't prepare any figures for the Merchants Warehouse.

Q. I beg your pardon?

A. The Reading Company didn't furnish any information for the Merchants Warehouse. I believe that was furnished direct by these people.

Q. Oh, you didn't furnish the information that is on this schedule relative to the Merchants Warehouse?

A. No, sir.

Q. You would not know what that traffic consisted of moving in and out of the Merchants Warehouse on the Reading and the B. &. O?

A. No, sir.

Q. Then, as I understand it, you have made up a statement which includes figures prepared from the records of the Reading Railroad, with the exception of the figures relating to one of these warehouses, to which you have stated that they are their own figures; is that right?

A. We didn't accept their figures. In other words, we had nothing to do with the Merchants figures. We were requested to furnish information for all of the warehouses, with the exception of the Merchants.

Q. With the exception of the Merchants then?

A. In this statement.

Q. But the information furnished on the statement, with the exception of the information as to the

freight moving in and out of the Merchants Warehouse, you furnished from your records?

A. Yes, sir.

Q. That is, insofar as the Reading Company is concerned?

A. That's right.

(This sheet was subsequently offered in evidence as Defendant's Exhibit No. 6.)

Testimony of EDGAR P. BROOKS, a witness called on behalf of defendant, Pennsylvania Railroad Company.

DIRECT EXAMINATION.

I am a traveling rate inspector of the Baltimore & Ohio Railroad. Ordinarily my position is to go around to the various freight stations, especially the smaller freight stations, and go over the work that the agents do. Witness was shown same sheet which had been shown to the preceding witness containing certain figures showing the tonnage of goods and carloads carried to and from all the public warehouses in Philadelphia during the years 1927 to 1932 inclusive. Witness had directed and supervised the preparation of the statement of such traffic carried over the lines of the Baltimore and Ohio Railroad Company.

CROSS-EXAMINATION.

Q. I notice on page 1 of this exhibit, which you have before you, 275 cars under the Reading column and a star showing that it contains shipments handled by the B. & O. in and out of the Merchants Warehouse. Do you know anything about this traffic or this amount?

A. No, sir.

Q. You do not?

A. No, sir.

Q. You don't know what the nature of the traffic was?

A. We didn't take off the statement that is in on behalf of the Merchants Warehouse Company.

Q. How about the cars from the B. & O.? How did they get from the B. & O. to the Merchants Warehouse Company?

A. To the Merchants Warehouse Company?

Q. Yes.

A. If the Merchants Warehouse is reached by the Belt Line Railroad, we give the cars to the Belt Line Railroad at our pier 62. That would be the only warehouse that we could get into, the only storage by the Belt.

Q. At Pier 62?

A. At Pier 62, we give it to the Belt Railroad, and it, in turn, would give it to the Merchants.

Q. Does the Belt have access to all the Merchants or only one?

A. I understand only one.

Q. Where is that?

A. That would be on Delaware Avenue.

The testimony of C. L. FRANCE, a witness called on behalf of defendant, Pennsylvania Railroad Company.

DIRECT EXAMINATION.

I am a traveling auditor of the Pennsylvania Railroad Company. My office is at 15 North Thirty-second Street. My duties generally are to examine accounts and make special investigations. Witness was shown the same sheet which had been shown to the preceding witnesses, containing the record of tonnage and carloads of goods handled by the various warehouses in Philadelphia, which had been identified and testified to

by the two preceding witnesses. Witness had directed and supervised the statement as to freight carried to the warehouses in Philadelphia over the lines of the Pennsylvania Railroad Company, and had also summarized the statements of the tonnage carried by the Reading Company and the Baltimore & Ohio Railroad. Witness had also checked the statement which was shown to him against the original documents and found it to be correct.

CROSS-EXAMINATION.

Q. You never checked the figures submitted by the Merchants Warehouse Company at all?

A. No, sir; I have no way of checking them.

Q. What kind of traffic was covered by your figures?

A. All traffic as far as the Pennsylvania was concerned.

Q. And that would include package freight, commodity freight, oil in cars, or liquids in tank cars, would it?

A. If there was any such thing; yes.

Q. And automobiles are not classed as package freight, are they?

A. I wouldn't say so.

Q. Don't you know that the tariff says otherwise?

A. It is just a question of whether they are or not.

RE-DIRECT EXAMINATION.

Q. Does or does not this statement only contain warehouse traffic?

A. Yes, sir.

MR. BARNES: If the Court please, I offer in evidence the schedules and statements, which have been the subject of the testimony of the various witnesses thereof.

MR. WHITE: I think they are worthless, but I will not object to them.

(The papers in question were offered in evidence and marked Defendant's Exhibit No. 6.)

Testimony of JOHN E. BOWERS, a witness called on behalf of defendant, Merchants Warehouse Company.

DIRECT EXAMINATION.

From 1926 to the fall of 1928, I had charge of the warehouses and branch offices of the Congoleum-Nairn Company. They are manufacturers of hard surface floor coverings. During that time I had occasion to use warehouse service in Philadelphia. At first we had a warehouse up on Delaware Avenue, right over the water, which was not satisfactory, and later we took space in the Merchants Warehouse Company. We found this very satisfactory. I knew nothing about the contract between the Pennsylvania Railroad Company and Merchants Warehouse Company, nor about the forty-eight-hour period of free storage. Those particular questions did not interest us. We entered into a contract for storage in the warehouse.

The reason we chose to deal with the Merchants Warehouse Company was that we had to have a given floor load, we had to have a certain ceiling height, and we had to be in a position to get an unlimited amount of space which we did not want to contract for. In other words, we wanted to pay for that space we used from month to month. The Merchants Warehouse could provide all the space we required.

At the time that we chose the Merchants Warehouse Company, our traffic department made certain investigations as to rates in freight warehouses which were turned over to me, and I looked at the Bailey

Warehouse, but from a space standpoint we were not able to get what we wanted there. It was necessary for us to send a great deal of matter to a central point. The charges of the Merchants Warehouse Company and the Bailey Warehouses were about the same. I did not make any investigation of the other warehouses. The location of the Merchants Warehouse influenced my choice because it was right in line with our Camden plant. Also, the insurance rates were very favorable. Our plant at Marcus Hook is on the line of the Pennsylvania Railroad Company, so that transportation over that railroad was the most convenient for us.

CROSS-EXAMINATION.

We rented space at the Merchants Warehouse Company, and paid so much per foot. We just paid for the space we used. It is hard to say what part of our goods were taken out in forty-eight hours and what part were stored for a longer period. You see, this material is of different patterns and the merchandise is put in there, and, of course, as our orders came through, it was taken out. Our storage rates were not based on the amount of traffic handled but on a space basis.

Testimony of W. B. GHEEN, a witness called on behalf of defendant, Pennsylvania Railroad Company.

DIRECT EXAMINATION.

I am assistant freight traffic manager of the Reading Company and have held that position since May, 1928. I have with me the tariffs filed with the Interstate Commerce Commission with respect to the warehouse business shipping into Philadelphia. I have before me copies of the consolidated freight classifica-

tion effective February 10, 1925, which provides for the loading and unloading of carload freight at all points in the official territory, which includes Philadelphia. It provides that carload freight shall be loaded and unloaded by the owners. In addition to that, the railroads publish another tariff which has exceptions to the classification and these exceptions provide that at certain stations in Philadelphia package freight, which is carried at carload rates, will be unloaded by the railroads free of any charge to the owners.

The first tariff I have here making provision for loading or unloading is Reading Company Tariff ICC, No. 189, effective August 15, 1925. Item 625 on page 65 of that tariff is as follows: "The following exceptions to section 1 of rule 27 of the official classification will apply to Philadelphia stations as below: Package freight carried at carload rates, will be unloaded and loaded by the railroad company except when handled direct to or from cars or team tracks at owners' request, . . ." and then it gives numerous stations at which this rule applies. The stations are Willow and Noble Streets, Chestnut Street Pier No. 8 South, Catherine Street, Carl Street Yard, Port Richmond, Lehigh Avenue, Second and Berks Streets, Twelfth and York Streets, Twentieth and Hamilton Streets, Twenty-third and Arch Streets, Broad and Callowhill Streets.

That tariff that I read from was cancelled and the same rule published in Reading Company Tariff ICC No. 800, effective February 1, 1930, with this exception . . . a note was added to the rule and the note reads as follows: "The term package freight does not include automobiles and other motor vehicles."

By Mr. Barnes:

Q. Is there any reference in there to the kind of freight going through any warehouse?

A. No reference made in the tariff to any warehouse.

Q. What was the practice with respect to freight going to warehouses?

MR. WHITE: That is objected to.

MR. BARNES: Your Honor, we propose to show by this witness that the Reading Railroad and the B. & O. Railroad at their stations and at these warehouses made the same concession of unloading without charge.

THE COURT: As I understand it, you propose to show that the Reading and the B. & O. were doing just what you were doing? Is there any objection to its being shown that the practice and the combination that you are charging here was common to all the three railroads?

MR. WHITE: These three railroads under other contracts.

THE COURT: Is there any objection to that?

MR. WHITE: None at all.

THE WITNESS: The Reading Company had contracts with the Pennsylvania Warehousing and Safe Deposit Company and also with the Philadelphia Cold Storage and Warehouse Company for the unloading of package freight at those warehouses under exactly the same conditions that the railroads would unload freight at their own stations.

CROSS-EXAMINATION.

By MR. WHITE:

Q. You don't quite mean what you last said, do you; exactly the same conditions; you don't mean that?

A. I mean the same tariff conditions as to package carload freight carried at carload rates.

Q. In these warehouses there were facilities for handling freight, and storing it, and taking care of the

freight, which were not provided by any railroad stations, were there not?

A. No; I should think only to the actual unloading of the freight, and the delivery to the owner, and the collection of the freight charges.

Q. Now, Mr. Gheen, will you look at Rule 23 of the official classification and read that to us and tell us what that covers?

A. Do you really mean Rule 23, as to——

Q. As to unloading and delivering to more than one shipper or consignee?

A. Pardon me?

Q. Rule 23 is what I want.

A. Rule 23, the consolidated freight classification in effect February 10, 1925, reads in Section 1——

Q. And effective in this territory?

A. Yes, sir.

"Section 1. Carriers' agents must not act as agents of shippers or consignees for the assembling or distribution of carload or less than carload freight.

"Section 2. Carriers' agents at all points of shipment must not accept freight to be carried at carload ratings or rates for distribution for two or more parties by carrier agents at points of destination.

"Section 3. Agents at points of destination must deliver freight carried at carload ratings or rates to one consignee only, and must not accept orders from shippers or consignees nor split deliveries according to brands, marks, sizes and other identifications of the package.

"Section 4. If at the request of the owner of the property or his authorized agent a carload shipment is delivered to more than one consignee,

less than carload ratings, rates will be applied on the entire shipment except that the portion delivered to the next consignee will be subject to Rule 15, Section 1."

Q. That means in effect, does it not, that the service, which has been described here, as rendered by the warehouse, namely, unloading freight from cars, dividing it into lots and delivering it to certain parties, which was sent at the request of the consignee, could not be legally or lawfully performed by the freight stations. That is quite clear, is it not?

A. Your question is quite clear, but I didn't hear that testimony that they did make all of those services beyond the loading of the car and placing the freight in position for the owner.

Q. Well, one of the services which the Warehouse Company renders to the public is to allow a carload lot to be shipped at carload rates and then the contents of the car to be distributed to several people who want it. That is correct, is it not?

A. I don't know whether they do that.

Q. You don't know that?

A. I don't know that they may split deliveries or separate deliveries; no, sir.

Q. You are not familiar with the warehouse business?

A. Some years ago I was in close contact with the warehouse companies and observed their practices in some respects, but I didn't know that they made deliveries different from the carriers, and if they made an added charge for the warehouse service, I don't know.

Q. Let us assume for a moment that split deliveries, as you call them, are made; that is, a carload, let us say, of soap delivered at a warehouse is divided into various proportions with the amount that is to be received by A, C and D being stipulated by consignor, and these different parties send their trucks to the

warehouse, and the soap is loaded into the trucks. Now, that kind of service of course could not be lawfully rendered under that tariff?

A. No; the freight station couldn't do it.

Q. Now, vice versa: The warehouse service, as has been testified to here; the warehouse sometimes receive a shipment which they sometimes make up into a carload, or they sometimes receive several shipments which they make up into a carload and ship it. That couldn't be done lawfully by a railroad station?

A. No. Understand, I am not saying that they did, but we wouldn't do it at the freight station.

Q. Now, is that tariff, which you read, still in effect, or was it up until April of 1931; Rule 23?

A. Still in effect as to loading and unloading package freight at railroad stations.

Q. Rule 23?

A. Yes; but of course we don't——

Q. And there were no exceptions to that?

A. There were no exceptions to Rule 23.

There is no provision in the tariff of 1925 excepting automobiles from the classification of package freight. The exception which I mentioned appears in the tariff effective February 1, 1930. It is possible that there were supplements to the 1925 tariff, prior to 1930, which made the same exception. I cannot say, as I have not got them with me.

By THE COURT:

Q. There is a difference in the tariff rates between a shipper of full carloads and one who ships in less than carloads?

A. Yes, sir, your Honor; that's true.

Q. Now, assume that I am a shipper with only half a carload and another shipper who has also half a carload lot. Do I understand you to say that as far as you know it is not the practice to have the shipment made to the warehouse—to have our two shipments put in

cars making up a full carload, and have that shipment made to the Warehouse Company or in care of the Warehouse Company, and when it is delivered to them to have them distribute it, giving me my half and giving the other man his half?

A. Your Honor, that wasn't the contract. Any freight hauled at less than carload rates was not delivered to the warehouse.

Q. Are you speaking of the warehouse, of your company's warehouse, or are you speaking of an independent warehouse?

A. I am speaking of it as the agent of the railroad.

Q. Of course, the warehouse man, as the agent of the railroad, had nothing to do with the distribution of the cargo among the several owners, but the question as I understood it was: The Warehouse Company, not as agent of the railroad but on their own account, didn't they make that distribution?

A. I think I answered the attorney, I didn't know the practice of the warehouse people.

Testimony of GEORGE S. HARLAN, a witness called on behalf of defendant, Pennsylvania Railroad Company.

DIRECT EXAMINATION.

I have been general freight agent of the Baltimore & Ohio Railroad at Philadelphia since February 1, 1924. I have with me the same tariffs which were described by the preceding witness. They apply to all railroads. I do not know in what year automobiles were excepted from the classification of package freight.

These tariffs show to what stations and warehouses in Philadelphia the provision for free loading and unloading of carload freight by the Baltimore &

Ohio Railroad Company applies. Special Service Tariff I. C. C. 21677, page 5, Item 35, Note 1, provides that package freight carried at carload rates will be loaded and unloaded by the Baltimore & Ohio Railroad at certain specified stations in Philadelphia, including Pier 62, South Philadelphia, Pa. Circular No. 687-A, which was cancelled by a supplement effective June 23, 1931, provided as follows:

> "Carload freight handled at Pennsylvania Warehousing & Safe Deposit Company: Delaware Avenue Stores, Morro Philips Stores, Twenty-third Street Stores, will be subject to the same rules and regulations as to loading and unloading as in effect at Pier 62, South Philadelphia, Pa., per B. & O. R. R., I. C. C., Nos. 21675 and 21677."

This was cancelled by a supplement effective June 23, 1931, which states that it is issued in conformity with the decision of the Interstate Commerce Commission in Docket 20968, Sub. 1, of December 28, 1929.

CROSS-EXAMINATION.

Q. You spoke of an exception to the classification. You meant an exception to Rule 27 of the classification, didn't you?

A. It doesn't appear in here that way. It appears as an item in our exceptions.

Q. What it amounts to is an exception to Rule 27?

A. That is what it amounts to, practically.

MR. BARNES: I will offer in evidence those tariffs which have been identified by those two witnesses.

(The tariffs in question identified by this witness and the preceding witness were offered in evidence and marked Defendant's Exhibits No. 7 and No. 8, respectively.)

Testimony of HARRY A. KELLEHER, a witness called on behalf of defendant, Merchants Warehouse Company.

DIRECT EXAMINATION.

I am plant manager of Campbell's Soup Company, Camden, New Jersey. We have had occasion to use warehouse space in Philadelphia for the storage of Campbell's soup, and have stored with the Merchants Warehouse Company, Bailey Warehouse, South Jersey Warehouse and the Terminal Warehouse Company. We store fresh vegetables and also the finished produce in the form of canned soups.

In picking out a warehouse, the first consideration is accessibility, both to our plant and the steamship piers; and the second consideration is service. We manufacture tomato soup. The preparation of the soup is accomplished in a period of about eight weeks and it is necessary to store almost a year's supply, and that means we must get into the warehouse very quickly. A year's supply would probably be about 200 million cans. We do not store this entire amount. Some of it is sold on what we call future orders—the customer takes it and stores it.

We always get the best service from the Merchants Warehouse, both in and out. I was there personally and saw what happened from day to day. The warehouse is clean. The service is desirable. They have recording thermometers in each of the rooms, and they furnish us with a daily report of the temperature, which is a very important thing in storing soups. They will work holidays or nights to get it out. At a time we may take as much as 100 carloads a day. That would mean that the Merchants Warehouse would probably increase their force two or three times so as to give us the service. We usually clean up one year's crop before we store the next pack.

I have been with the Campbell's Soup Company for twenty years and I think we have dealt with the Merchants Warehouse Company during all that period. I was not familiar with the contracts between the Pennsylvania Railroad Company and Merchants Warehouse Company, nor with the forty-eight-hour free storage element. Neither of these items attracted us to the Merchants Warehouse Company. A large part of our deliveries to the warehouse are hauled by truck.

There is no other warehouse in Philadelphia that I know of that could handle such a large quantity as we store in the Merchants Warehouse. That is the reason we go there. We carry the insurance, but that is handled by another department and I am not familiar with it.

CROSS-EXAMINATION.

Our manufacturing plant is at the southwest corner of Second and Market Streets, Camden, just across the Delaware River. About half of our deliveries to the Merchants Warehouse Company are made by truck. The goods are often ordered out for shipment to distant points in carloads, throughout the year.

Q. When you got shipments by rail, when the cars were detained in the yards or not unloaded for some days, did you ever pay demurrage?

A. I am not familiar with that, sir.

Q. As a matter of fact, you do know, do you not—here are pages and pages (indicating) in figures already in evidence; literally pages of cars consigned to the Campbell Soup Company, delayed all the way from five or six days to ten or twelve days?

A. I might answer that by saying that the duties of a plant manager have nothing to do whatever with the cost of the storage. All I do is to pass upon the desirability of the storage.

Q. Would you know if you had to pay demurrage?

A. No, sir; I wouldn't, unless it was called to my attention.

Q. If it had been called to your attention, that you didn't have to pay any demurrage no matter how long your cars were delayed that would enter into your choice of a warehouse?

A. Yes.

RE-DIRECT EXAMINATION.

We stored no raw tomatoes in the Merchants Warehouse Company, but only cans of soup. They have no cold storage there.

When cars come in, it is our desire to get the product into the warehouse, and not to leave it in the cars. About half of our product that was shipped out of the warehouse went by truck and the other half by rail.

RE-CROSS-EXAMINATION.

I do not know Mr. Sullivan. I never met any solicitors from the Terminal Warehouse Company, coming to get our business. They don't come to see me. They would come to the traffic department.

Q. Then you don't know why they would not give any business to the Terminal Warehouse?

A. I know this, that the Terminal warehouses are not located so well.

Q. They are located in the center of the city?

A. The Merchants Warehouse has three warehouses, one at Delaware and Chestnut, and then one at Delaware Avenue and I guess its Water and Bainbridge and the Shackamaxon. They have two places where you can load by truck, and then one at Federal Street, which is close to the lower piers, so that they take in the whole waterfront, and makes a short haul for us.

Q. The Terminal has a warehouse at Delaware Avenue and Spring Garden?

A. I believe they do.

Q. And Delaware Avenue and Brown?

A. That would be too far down for us. If everything was even, I would say "no"—I would take the Merchants Warehouse locations.

Q. Do you use the bridge?

A. No; we use the ferries. With the bridge we would have to drive four or five blocks, and the ferry we only go one block.

Testimony of S. H. LEVIN, a witness called on behalf of defendant, Merchants Warehouse Company.

DIRECT EXAMINATION.

I am a wholesaler in canned goods and salt fish. We store in the Merchants Warehouse Company, but in my experience I think we have used them all. The Merchants Warehouse was used by my predecessors over thirty-four years, and the natural thing was to stick to the people that gave us good service, in a neighborhood where our stuff carried well, and where everything was entirely satisfactory. The warehouse is adjacent to our place of business, at 116 North Delaware Avenue. We have used several of their warehouses.

I am not familiar with the contracts between the Pennsylvania Railroad Company and the Merchants Warehouse Company, nor with the forty-eight hours free storage, and these items had nothing whatever to do with my choice of the Merchants Warehouse. I think friendship has a great deal to do with our patronizing that warehouse. We have done business with them, you see, over forty years continuously. I have not checked up the rates charged by the Merchants Company for storage compared with other warehouses. I think sometimes they charge us more than they should, but I stick to them because of our friendly relations.

Testimony of CHARLES A. CAREY, a witness called on behalf of the defendant, Merchants Warehouse Company.

DIRECT EXAMINATION.

I am a merchandise broker and fruit purchaser and deal chiefly in canned goods, and have been in that business for twenty-five years. My office is at 308 Chestnut Street. I have had frequent occasion to make use of warehouse service in Philadelphia. Sometimes goods are consigned to us which have to be stored, and sometimes goods come for our customers. In choosing a warehouse we use our own judgment as to our own consignments and follow the choice of our customers as to their consignments. We have used the Merchants Warehouse Company, the Pennsylvania Warehousing and Safe Deposit Company and the Philadelphia Cold Storage and Warehousing Company, principally. In choosing a warehouse we would probably first take into consideration accessibility and convenience

Before I went into the brokerage business, I was connected with a wholesale house on Front Street for twenty-two years. In those days we used the Merchants Warehouse Company more than any other company on account of its being right around the corner and handy if you wanted to draw samples. In addition to convenience of using this warehouse, we liked it because it was well run—good warehouse people.

Storage rates have not been much of a consideration with us, since they are pretty much alike.

Most of the goods which we now store are canned fruits and dried vegetables from California. At the present time most of these are coming by steamer through the canal, but before the war they all came by rail, and a great many would go to a warehouse; a great many would go direct to the freight depots of the different railroads.

Q. Do they require any particular kind of temperature or atmospheric conditions for storage?

A. Dried fruits would in a general way, except in summertime when they would have to go into cold storage.

Q. You take that into consideration in choosing a warehouse, too?

A. As a rule the average warehouseman, knowing his business knows what to do with dried fruit.

Q. Did you ever use the Terminal Warehouse?

A. No, sir.

I was not familiar with the contracts between the Pennsylvania Railroad Company and the Merchants Warehouse Company. In those days we got the same privileges from all the warehouses we dealt with. Pennsylvania Railroad shipments went to the Merchants Warehouse Company; Reading and Baltimore & Ohio shipments went to the Pennsylvania Warehousing and Safe Deposit Company; and Reading shipments also went to the Philadelphia Warehousing and Cold Storage Company. We did not make use of the financial service extended by the Merchants Company, although some of our principals did so.

CROSS-EXAMINATION.

The privileges which I spoke of getting from all the warehouses we dealt with were, in recent days, two days free storage and insurance, and no charge for handling, if we took goods away within two days.

Q. They were the only three warehouses that could give you those privileges?

A. They were about the only warehouses of any account in Philadelphia until later on.

I do not remember that the Terminal Warehouse ever solicited our business.

RE-DIRECT EXAMINATION.

When our goods come in by steamship to the piers, we get four or five days free storage. Sometimes they make exceptions and grant you longer than that.

Testimony of EDWIN C. ECKMAN, a witness called on behalf of defendant, Merchants Warehouse Company.

DIRECT EXAMINATION.

I am a merchandise broker dealing in canned goods, dried fruits and cereals. My place of business is 35 S. Front Street. I have been in business for forty years. I represent principals as well as myself.

I have made use of the Merchants Warehouse Company, Philadelphia Warehousing and Cold Storage Company, Pennsylvania Warehousing and Safe Deposit Company, and the Terminal Warehouse Company. We have been dealing with the Merchants Warehouse Company ever since it was built. In choosing a warehouse we take the following elements into consideration: First, nearness to our business and to the business of our clients. Then we take into consideration the rates, but sometimes one would be a little more than another, and we found it would not pay to change around from one warehouse to another in order to get a little bit better rate, because they would vary from time to time we found. There is very little difference in the rates for the storage of the kind of goods we handle. Service is another important consideration in choosing a warehouse. I have never used the financing service offered by the Merchants Warehouse Company, nor to my knowledge have any of our customers. Insurance rates enter into the choice of the warehouse, inasmuch as we try to take care of our principals as much as possible and to save money.

I am not familiar with the contracts between the Pennsylvania Railroad Company and the Merchants Warehouse Company. No one ever mentioned them to me.

We still use the Merchants Warehouse Company and, in fact, we are not dealing with any other warehouse company at the present. We dealt with the Terminal Warehouse Company at various times in former years, and we always got the same service there when we used it, but it was away out of our limits; we would have to spend a lot of time going back and forth.

CROSS-EXAMINATION.

We have not dealt with the Terminal Warehouse Company for twenty years. During the last ten years, we have handled a good deal of merchandise, chiefly canned goods, through the Merchants Warehouse Company. When a car is consigned to us at the Merchants Warehouse Company, we frequently have distribution made to several different people on order. That is not the usual thing; when we have a pool car we will do that; if it is a full car, we don't bring it to the warehouse. We used to get forty-eight hours free service until it stopped. If we took goods away, when one or six or more took a single carload within forty-eight hours, there was no charge. There was no insurance charge on those goods which were taken away within forty-eight hours.

Q. That service was never given to you by the Terminal Warehouse?

A. By every warehouse we ever dealt with.

Q. Did Terminal give it to you?

A. Yes, sir.

Q. You remember that?

A. Yes, sir; or we wouldn't have dealt with them.

Q. You wouldn't have dealt with them otherwise?

A. No, sir.

Q. In other words, you would not have dealt with any warehouse that would not give you that service?

A. If they were all giving it, we certainly wouldn't.

Testimony of H. H. McLACHLAN, a witness called on behalf of defendant, Merchants Warehouse Company.

DIRECT EXAMINATION.

I am a merchandise broker dealing in soups and canned goods. I have been in the brokerage business for twelve years. Prior to that I was district sales manager for Loucks Bros. and Company, soaps. In the course of my trade I have dealt with Bailey Warehouses and with the Merchants Warehouse Company and the Pennsylvania Warehousing and Safe Deposit Company.

When I was sales manager for Loucks Brothers and Company, we used to deal with the Terminal Warehouse Company, but their service wasn't satisfactory. I could not get my receipts back showing deliveries had been effected in time. Within the last sixty days, their man has been in my office and said that had all been corrected some time ago.

The element of service has a great influence upon my choice of a warehouse. Another element which I take into consideration is rates. I do not remember how the rates of the Terminal Warehouse Company compare with the rates of the Merchants Warehouse Company. When I left the Terminal Warehouse I let it be known I was drawing out. I let it be known by all warehouses that I was going to make a change and the Bailey Warehouses made me the best price and the best rate, and I went to the Bailey. I stayed there until Loucks Brothers discontinued business.

Q. Did you ask Merchants, or any others to meet Bailey's price?

A. I asked all for the best rates; I never tried to make a change after I got Bailey.

I am not using the Bailey Warehouses now, because they are far away from the canned goods people. Here a jobber must call for his goods.

I did not utilize the forty-eight hours free time at the Merchants Warehouse Company. All the goods I have carried in the Merchants have come by boat. The question of unloading cars had nothing to do with my choice. My choice was based entirely on service and location.

CROSS-EXAMINATION.

Q. How long ago were you with the Terminal?

A. Oh, perhaps fourteen or fifteen years ago.

Testimony of GEORGE F. MALONE, a witness called on behalf of defendant, Pennsylvania Railroad Company.

DIRECT EXAMINATION.

I am superintendent of car service of the Baltimore & Ohio Railroad Company. I have occupied that position for twenty-three years. I have charge of the records of the cars, mileage, payment and demurrage.

No demurrage was charged by the Baltimore & Ohio Railroad Company for the detention of cars placed on the sidings of the Pennsylvania Warehousing and Safe Deposit Company. The reason for this was that we considered the Pennsylvania Warehousing Company to be the same as one of our other stations in Philadelphia.

Testimony of HOWARD A. WASHINGTON, a witness called on behalf of defendant, Merchants Warehouse Company.

DIRECT EXAMINATION.

I am in the fruit brokerage business with offices at 121 Chestnut Street. I have been in that business for thirty years dealing in canned goods, dried fruits and cereals. I have dealt with the Terminal Warehouse Company, the Old International, the Pennsylvania Warehousing and Safe Deposit Company and the Merchants Warehouse Company. I now deal with the Pennsylvania Warehousing and Safe Deposit Company and the Merchants Warehouse Company.

I have not dealt with the Terminal Warehouse Company since about 1918. My reason for leaving them was that they gave unsatisfactory service. They mixed up the deliveries of the merchandise to our customers, getting the wrong brands and twisting it up.

In choosing a warehouse we take into consideration location, access to piers and different railroad stations and to customers. We also consider rates and service. There was not a lot of difference in the rates between the several warehouses during this period. We usually found the Merchants a little higher.

I knew about the forty-eight hours free time and made use of it in the case of pool car shipments. However, this was not what attracted us to the Merchants Warehouse Company, because all the other warehouses gave the same service. They all gave the same unloading service too.

We also still deal with the Pennsylvania Warehousing and Safe Deposit Company. Our principals ask us for recommendations as to warehouses and we give them the facts and the rates, and then they select the warehouse.

CROSS-EXAMINATION.

Q. You say all the warehouses gave forty-eight hours free service; what warehouses do you mean?

A. Well, when we stored at the Terminal, we got forty-eight hours free service.

Q. When was that?

A. Prior to 1918.

Q. That was sixteen years ago; you got all this free service, of course, forty-eight hours, at the Merchants?

A. Yes.

Q. And at the Pennsylvania Safe Deposit?

A. Yes, sir.

Q. Any others?

A. International Warehouse, which has since gone out of business.

Q. They went out of business, did they?

A. Yes, sir.

Q. Those are the ones you spoke of when you said "all"?

A. Yes.

Q. Were you with this company in 1918 when you were doing business with the Terminal?

A. No; I was in the War at that time.

Q. Were you there at all?

A. Not during the year 1918; I was there from 1911 up to 1918 until I went in the service.

Q. You went out in 1918?

A. Yes.

Q. What were you doing between 1911 and 1918?

A. Salesman in the business.

Q. Salesman?

A. Yes, sir.

Q. Were you there when your business was taken away from the Terminal Warehouse?

A. I was in the service at that time.

Q. How do you know the reason for it, then?

A. Because the young lady we had in our office who had been with us for twenty-seven years gave me the information.

Q. She told you?

A. I asked her, yes.

Testimony of BURTON PROCTOR, a witness called on behalf of defendant, Merchants Warehouse Company.

DIRECT EXAMINATION.

I am secretary and treasurer of the Mt. Airy Canning Company and a partner in N. H. Foulke & Company. The Mt. Airy Company packs canned food in Maryland, and the other company is a brokerage concern in canned foods and canners' supplies. We have a very large trade here and we ship a lot of goods to Philadelphia. The greater bulk of the goods are shipped direct to our customers in Philadelphia, but we use warehouses for goods on storage at times. For this purpose we used the Merchants Warehouse Company in my brokerage business for a good many years and the Mt. Airy Canning Company has used it off and on since it was formed in 1916. I have been solicited by other warehouses, but I have never used them. The arrangements were so satisfactory and the business was handled so nicely that one wouldn't want to change unless there was some material advantage like a lower rate, or something like that, which would save one money. I do not remember definitely whether lower rates were quoted to me in these solicitations until a little while ago when a cut rate was offered, and I immediately took it up with the Merchants Warehouse Company. They said they would have to meet legitimate competition; if it was a reputable warehouse, they would do it.

I always understood in shipping to Philadelphia that you had forty-eight hours to unload a car. When we shipped goods to be stored in the warehouse, it would make no difference to us whether there was forty-eight hours for unloading the car or not; that was up to the warehouse. We used to want the goods unloaded and put in storage as quickly as possible in order to get the money. This element had nothing to do with our choice of the Merchants Warehouse Company.

CROSS-EXAMINATION.

We sold our goods F. O. B. the factory, and any charges for freight, storage or distribution were borne by our customers. I don't know whether there was forty-eight hour free period and free handling for such goods or not. It would not have influenced us one way or the other in choosing the Merchants.

Q. Under the practice of shipping goods in here and immediately being distributed, you wouldn't pay any freight, or perhaps nothing at all if they were shipped out in forty-eight hours; if you had been charged for that, you would consider that a very important item, wouldn't you?

A. That would have been a matter for the buyer who had already bought the goods and ordered them shipped in here. Our goods are sold F. O. B. our factory.

Q. Sure, but I mean it would make a difference to your customer?

A. It might have made a difference to him; I don't know.

Testimony of A. FLETCHER SISK, a witness called on behalf of defendant, Merchants Warehouse Company.

DIRECT EXAMINATION.

I am a factor and broker with offices at Preston, Maryland, and Aberdeen, Maryland. We deal in canned goods and I have been in this business all my life. We ship both direct to customers in Philadelphia and to warehouses in Philadelphia for future sale. We use the Pennsylvania Warehousing and Safe Deposit Company and the Merchants Warehouse Company. We have dealt with the Merchants Warehouse Company ever since I can remember. It was a good warehouse. We got good service and it just got to be a habit. By good service, I mean they kept our goods in good condition and if we wanted them shipped out in a hurry, they would ship them out in a hurry and things of that kind. They would also label and inspect our goods for us. We also made use of their financing service, and so did our customers. We did not really consider rates for storage in choosing a warehouse because I think the rates were all about the same.

I was not familiar with this forty-eight hours free time, nor with the free unloading. That had nothing to do with our choosing the Merchants Warehouse Company.

CROSS-EXAMINATION.

The goods that we did not ship direct to customers all went into storage. They did not go into a warehouse and get the use of a forty-eight hours free time.

Testimony of GEORGE KENYON, a witness called on behalf of the defendant, Merchants Warehouse Company.

DIRECT EXAMINATION.

I live in New York. My business is supervising warehouses for the Vacuum Oil Company. I have been with the company for seventeen years. We have dealt with the Terminal Warehouse Company and the Merchants Warehouse Company, and just about the time I came to the company we had a small warehouse on Arch Street.

The Terminal Warehouse was the first one we dealt with. We left them in 1922 to improve our service and reduce our costs. The building really wasn't suitable to the work we were doing. It was a ground floor and a basement and there was a very small elevator that ran with a jerk and we couldn't keep it going regularly. We handled barrels and cases of oil, storing them and delivering them. The ground floor of the building and first basement were fairly well adapted for the storage of these barrels but the subcellar was rather damp.

When we left the Terminal Warehouse Company in 1922, we went to the Merchants Warehouse Company, on the advice of a man we had representing us. He thought we could do better by going there so I made arrangements with them to take space in their Front Street stores. We have a plant of our own now and no longer use any public warehouse.

At the Merchants Warehouse Company we paid more than we had at the Terminal Warehouse. At times, we made use of the forty-eight hours free service, although as a rule we were hired space and could load our cars right in, so that element did not make much difference in our choice. We got very good service indeed at the Merchants Warehouse Company and

stayed there until 1929 or 1930 when we built our own warehouse.

CROSS-EXAMINATION.

The warehouse of the Terminal Warehouse Company in which we had space was on North Front Street, pretty close to Race. There was no rail service in the building; we had a cartage in operation. We did not use the forty-eight free hours service either at the Terminal Warehouse or the Merchants Warehouse Company. Our products all went into storage. We hired about 15,000 square feet by the month.

Q. Then you didn't really have a public warehouse at all; you simply leased space?

A. Absolutely.

Q. Did you pay for the unloading of it into the space?

A. Into which space?

Q. Into the space you leased?

A. No, we paid no unloading anywhere. When we were at Terminal it was unloaded at the pier, and when we were at Merchants it was unloaded to the place.

Q. You paid no unloading charge?

A. No unloading charge.

Testimony of GEORGE LaCROIX, a witness called on behalf of defendant, Merchants Warehouse Company.

DIRECT EXAMINATION.

I am with the Union Bag and Paper Company and have been with them for twenty years. I am located in New York but do business in Philadelphia, too. Part of my duties are the selection and inspection of warehouse space.

In the last fifteen years the company has used two public warehouses in Philadelphia, the Terminal Warehouse Company and the Merchants Warehouse Company. About 1926 and before that they leased space in one of the brick warehouses of the Terminal Warehouse Company. The contract was for one or two years. It was about this time that I began to take charge of this department, and from my experience with warehouses throughout the country, I felt that we had what was rather a high cost arrangement with the Terminal Warehouse Company, both from the standpoint of costs to us, because of a fixed overhead, and the high rate we were paying for space. We were paying, I should say, considerably more than we should have been paying. It was a contract entered into by our branch sales organization which, of course, were not specialists in warehousing. Before the expiration of the contract I had several interviews with Mr. Sullivan, endeavoring to get both the labor handling rate, which, incidentally, was increased during the duration of the contract, and which should not have been increased, and also the space basis down to a rate that would be comparable to what we could hire space for and get the same service for all over the city and in other parts of the country. I was stalled, very pleasantly stalled, during the remaining part of the contract, and so when that was through, I said what I was looking for and opened up the whole territory. I had been given good reason to believe that something was going to be done. From the way Mr. Sullivan put things, I thought I was justified in making that assumption, but nothing was done, so at the end of the lease I moved out.

It was at that time, after the expiration of that lease, that we sold our own trucks which we were operating at the time, and went into a public warehouse. You see, I was the public warehouse man, and

I had to demonstrate the economics of public warehousing as against space, and that was one of the first changes I made, and it brought about a considerable saving to the Bag Company, not because of obtaining low rates from the Merchants Warehouse Company, because the rates were not any lower there than in any other part of the country, but because of our eliminating a fixed overhead.

When I left the Terminal Warehouse Company, I went to the Merchants Warehouse Company. I think that was the only warehouse I considered at that time. We are still there.

Q. What kind of service have you had there?

A. Well, so good that I wouldn't—in fact, I have remained there when we could have reduced our costs in Philadelphia; in other words, the personality and service, and everything was so pleasant, and although I could have reduced our costs 40 or 50 per cent. several years ago, I remained there because the service is a factor, and Mr. Richardson, when I made the move, he promised me he would give me good service. He says "you can depend upon me for that," and he didn't spare any expense to give it to me.

Q. That is what you counted on?

A. That is what I counted on.

Q. Were you over there during the forty-eight hours free service?

A. To tell you the truth, I never heard of it—I mean the forty-eight hours. There are some cities that have twenty-four hours' free time, but that never was a thing that interested me, because when our merchandise is shipped it has to arrive at destination at the quickest possible moment. If it is pooled distribution, the customers are howling.

Q. You are not interested in cars lying on the tracks free of demurrage?

A. I can show you correspondence where cars laid on the track, and I raised the old Harry because they did.

Q. You have been solicited since you have been at Merchants, then, for warehouse space at lower rates, have you?

A. Oh, sure. The Terminal have been after us—not through me, but through our branch managers here, and I have been solicited by Mr. Dickson of the Bailey, and Mr. Justice of the Pennsylvania Safe Deposit.

Q. Where is your office in Philadelphia?

A. In the Terminal Warehouse Office Building up on Broad Street; I think it is called the Commerce Building.

Q. You have an office there, but not a warehouse?

A. I think they thought they might get us to warehouse with them if we took an office with them.

Q. But you did not?

A. No.

CROSS-EXAMINATION.

We distribute some of our products through the warehouse immediately. We pay a storage rate per bundle and we don't have forty-eight hours' free storage. The storage charges start the day the car arrives. If the product is not put in storage at all but is shipped out immediately by truck, no storage charge is made for it and no direct handling charge.

Q. Isn't it a fact when you were about to leave the Terminal Warehouse you told Mr. Sullivan unless he could give you the equivalent of free handling and free storage for forty-eight hours you were going to the Merchants?

A. No, sir.

Q. You didn't tell him that?

A. No, sir.

Q. You didn't say that was the reason for your leaving?

A. Listen; I would have reason if I had been getting the same terms, because I have made a reputation in my company for picking out warehouses, and I make very few changes, and when I get a warehouse I generally—they generally stay put and I generally stay put.

I did not myself complain to Mr. Sullivan about the service he was giving us at the Terminal Warehouse Company. He was giving us practically no service at all, because we had our own space and our own men there. If any complaint was made to him I knew nothing about it. It would have come through our Philadelphia office.

Testimony of CHARLES W. MATHER, a witness called on behalf of defendant, Merchants Warehouse Company.

DIRECT EXAMINATION.

I am with the Mather Paper Company. We do business in Philadelphia and have occasion to use warehouse space there. I have dealt only with the Merchants Warehouse Company. I picked out the Merchants Warehouse Company because I needed additional space; and I looked over the Terminal Warehouse Company and also the Bailey Warehouse and couldn't get anything like what I wanted; and the Merchants Warehouse at 611 South Front Street was especially adapted to my work, especially the basement, for the storage of paper. That is a good place for the storage of paper. I have been dealing with the Merchants Warehouse since 1930.

Almost all of the products we handle went into storage, and the question of free handling and the forty-eight hours' free service had nothing at all to do with our use of this warehouse. The rates were a little

higher, if anything, than the rates are at other warehouses, but the service was remarkably good.

CROSS-EXAMINATION.

Q. The storage rates were about the same that were offered you from the Merchants and the Terminal?

A. Yes; they figured about the same.

Q. Did you send any of your products through the warehouse without putting it in storage?

A. Practically nothing; carloads and pooled cars, they go through.

Q. Everything went into storage?

A. We handled everything in our own space.

Q. So the question of free handling and the forty-eight hours' free service had nothing to do with it at all?

A. No, absolutely.

Testimony of CHARLES F. BONSOR, a witness called on behalf of defendant, Merchants Warehouse Company.

DIRECT EXAMINATION.

I deal in wholesale food products at Delaware Avenue and Lombard Streets. I have been in that business for thirty years. Up until three years ago we handled principally coffee, tea, rice, California dried fruits and beans. In addition to that we now handle canned goods; principally gallon goods. We have constant occasion to use public warehouses in Philadelphia.

We used the Merchants Warehouse Company about ten years previous to 1923, and then we rented the building adjoining the Bailey Warehouse, and they cut an opening through the partition wall so that we

could use their warehouse. However, this turned out to be unsatisfactory, and after three years we were obliged to give it up. It was unsatisfactory because Bailey warehouses had no facilities for shipping their daily cars such as the Merchants Warehouse had. For instance, we might have an order for twenty-five bags or 100 bags—we sell principally to wholesale grocers—and they might have to go to different parts of the country. The Merchants Warehouse Company always took them every day to some distributing point and started them on the right car. For example, if they were going to Washington, they put them on the Washington car. The Bailey organization was not up to taking them out every day.

After leaving the Bailey warehouses, we returned to the Merchants Company. We did not consider going to the Terminal Warehouse Company, because we always had such success with the Merchants Warehouse Company; they were very efficient. For example, in handling coffee, we bill the coffee to Pier 98—that is probably the best adapted pier for handling coffee that I have ever seen. Our insurance rate there is the lowest we have ever had. We have been known to get a shipment of coffee on a certain day, and before night the Merchants Warehouse Company would have some of the cars loaded out of that place—whereas in New York under the same conditions it would take four or five days to get the same service.

At the present moment the question of the location of a warehouse also interests us for we are located in those buildings at 502 South Delaware Avenue and the Merchants Company and the Pennsylvania Warehousing and Safe Deposit Company are right around the corner. We also used the Pennsylvania Warehousing and Safe Deposit Company.

We have no occasion to use the forty-eight hours' free storage, in fact, I have never heard of it. Our

stuff does not move that way to the best of my knowledge. We have never paid anybody an unloading charge in Philadelphia so far as I know. It is customary in New York, however. A good part of our products come in by ship, but we also get a good part by rail. We have used the financing service of the Merchants Warehouse Company and this has been a great advantage to us.

Q. Have you noticed any difference in storage charges between these various warehouses?

A. No, I don't know of any.

Q. Have you been solicited by others?

A. We have been solicited by others, but they have never shown us any advantage. For that reason we are satisfied, and continued with Merchants.

CROSS-EXAMINATION.

All of our goods going into the Merchants Warehouse Company go on storage. The question of free delivery has nothing to do with us.

Testimony of I. H. NESTER, a witness called on behalf of the defendant, Merchants Warehouse Company.

DIRECT EXAMINATION.

I am in the wholesale distributing business and brokerage business at No. 3 Chestnut Street, and have been engaged in that business since 1914. I specialize mostly at this time in condensed buttermilk. For four or five years I rented space on Delaware Avenue for the storage of goods and then transferred into the Merchants Warehouse. I have been with the Merchants Warehouse Company for more than thirteen years. The elements I took into consideration in choosing the

Merchants Warehouse Company were the basement they offered me in which I could store my material and the close proximity to my business at 3 Chestnut Street. One is across the street from the other. I have not used any other warehouse since going to the Merchants. I have been solicited by other warehouse companies and intimations of a lower rate have been made, but under the circumstances I have refused to consider such offers. One such solicitation came from the Bailey Warehouses and another from the Terminal Warehouse Company. I was not interested in the offers because I had a great deal of sampling and it is sometimes necessary for me to go across the street two or three times a day or send one of my men three or four times a day to see what the material is like.

I was not familiar with the contracts between the Pennsylvania Railroad Company and the Merchants Warehouse Company for the free unloading of cars, nor with the provision for forty-eight hours' free storage, and I know nothing about the charging of demurrage. To my knowledge I never had cars standing on the siding free of demurrage, because I always rushed them hard to get the cars in.

CROSS-EXAMINATION.

My business is in condensed buttermilk, which is used for animal feed. It is a semi-liquid consistency. After I gave up my place on North Delaware Avenue I stored with the Merchants Warehouse Company. I am not in the storage basement, but they gave me a good space in the basement that was cool and just what I needed. Most of my product when it comes in goes right into storage, but some of it is trucked out. When it was trucked out within forty-eight hours I was not, to my knowledge, charged anything for handling or storage.

RE-DIRECT EXAMINATION.

I am charged for handling within forty-eight hours at the present time, but I have not left the Merchants Warehouse Company.

Goods shipped to me over the Reading Railroad go to pier 8 and what is left there is trucked across to the Merchants Warehouse. I do not have to pay for the first forty-eight hours at the Reading pier. During the war time I used the Philadelphia Cold Storage Warehouse, when I handled quite a little milk for the bakery business.

Testimony of JOHN B. PARK, a witness called on behalf of the defendant, Merchants Warehouse Company.

DIRECT EXAMINATION.

I am a merchandise broker specializing in dried beans and peas. I have been in this business for seventeen years and my office is in the Merchants Warehouse Building, River Front Stores. We use a great deal of warehouse space in Philadelphia at times. We have had occasion to use practically every warehouse in the city at one time or another. Our principal storage is with the Merchants Warehouse Company. We used the Terminal Warehouse Company some years ago, but do not use it now. Our reason for not using the Terminal Warehouse Company any longer is that their warehouses are less conveniently located and we did not feel that the service we were getting was as good as at some other place. I don't recollect any difference in the charges made by the Merchants Warehouse Company and other warehouse companies. Good location and service are very important considerations in choosing a warehouse.

I know nothing about the contracts between the Pennsylvania Railroad Company and the Merchants Warehouse Company and these contracts had no bearing on our choice of the Merchants Warehouse Company. I know nothing about the absence of demurrage charges because we were always anxious to get our goods in. We don't make any money until we sell them and make delivery. We have occasionally made use of the financing provided by the Merchants Warehouse and both our shippers and our customers have used it.

We are not using the Merchants Warehouse exclusively. We sometimes use the Pennsylvania Warehousing & Safe Deposit Company and we have had storage with the Baily Warehouses.

CROSS-EXAMINATION.

The last business we did with the Terminal Warehouse Company was about 1925 or 1926.

The dried peas and beans in which we specialize are usually packed in 100-pound sacks. Sometimes when shipments arrive they are moved out directly to customers and others were put in storage. When shipments were removed within forty-eight hours of arrival we paid no charge for handling or storage prior to 1931.

Q. And you would not have gone to any other warehouse that could not give you that same privilege?

A. I don't know. I was under the impression that it was available at all warehouses.

Q. But anyway you would not? That's quite clear, isn't it?

A. That's right.

RE-DIRECT EXAMINATION.

Q. Was it available at all warehouses, if you know?

A. I believe it was.

Q. With those you dealt with?

A. It was, as far as I know.

Testimony of JAMES J. REILLY, a witness called on behalf of the defendant, Merchants Warehouse Company.

DIRECT EXAMINATION.

I am a food broker dealing in canned goods and grocery products. I am associated with the National Food Brokers' Association, Philadelphia Food Brokers' Association and the Association of Manufacturers' Representatives. I have been in business twenty-one years and my office is at Third and Chestnut Streets. I have had occasion to use warehouse service in Philadelphia and have dealt with the Bailey Warehouses, the Pennsylvania Warehousing & Safe Deposit Company, Terminal Warehouse Company and Merchants Warehouse Company.

I stopped dealing with the Terminal Warehouse Company around 1930 because we had several instances where merchandise was delivered in error, and those conditions did not seem to improve, causing us quite some inconvenience. My secretary, who looks after that, didn't seem to be able to correct it. I stepped in on it, contacted the gentleman in charge of the warehouse, and after some difficulty we decided to stop it. It was causing us too much inconvenience. There was no appreciable difference in rates between the Merchants Warehouse Company and the Terminal Warehouse Company.

I consider the most important factors in choosing a warehouse are the service which it gives plus the convenience not only to my buyers but to myself.

I was not familiar with the contracts between the Pennsylvania Railroad Company and the Merchants Warehouse Company, but I did know there was a period of forty-eight hours in which there was free storage. Of course, this is no longer so. I have not stopped dealing with the Merchants Warehouse Company on

that account. I still deal with the Merchants Warehouse Company.

I had similar arrangements with the other warehouses with which I dealt, allowing the cars to remain on a siding free of charge for a certain period. I had a large business.

I also have made use of the financing facilities of the Merchants Warehouse Company. This has been important to me at times, and to my customers particularly.

CROSS-EXAMINATION.

Q. You are not interested in demurrage, but you are very much interested if you had to pay demurrage, if the cars were detained?

A. Well, I was——

Q. You never had to pay that while you dealt with the Merchants?

A. No, sir.

Q. As a matter of fact, you testified against having these allowanc ontinued before the Interstate Commerce Commission, didn't you?

A. That's correct.

Testimony of J. I. DAILY, a witness called on behalf of the defendant, Merchants Warehouse Company.

DIRECT EXAMINATION.

I am a food broker dealing in canned goods, etc.—the same sort of business as the last witness. I have been in business for twenty-four years. My office is at 136 South Third Street. I represent a number of principals.. I have occasionally made use of the warehouse service in Philadelphia. Most of our business is in carload shipments. We started a great many years ago dealing with the Merchants Warehouse Company

and afterwards we did some business with the Pennsylvania Warehousing & Safe Deposit Company, and as I recall at one time we did some business with the Terminal Warehouse Company. That was long ago. I do not remember the date.

Probably the chief reason that we have for dealing with the Merchants Warehouse Company, where we store most of our merchandise, is that we always get what we consider excellent service there. It started prior to the war with transcontinental shipments, and we routed them by the Pennsylvania Railroad. We always considered the Merchants Warehouse as a Pennsylvania Railroad delivering point here, just as we have always considered the Pennsylvania Warehousing & Safe Deposit Company as a delivery point for the Reading Company and the Baltimore & Ohio Railroad.

I never knew of any contract between the Pennsylvania Railroad Company and Merchants Warehouse Company, but I was familiar with the fact that forty-eight hours' free time was granted and assumed that that was available everywhere. The same privilege was given at the Pennsylvania Warehousing & Safe Deposit Company which we used for shipments coming over the Reading and the Baltimore & Ohio Railroads.

I do not recall any occasion on which a car stayed in the yards free of demurrage. I never asked that a car be kept in the yards. We have always been able to get our cars spotted and deliveries made. If anything that has been our principal worry.

We have never used the financing facilities of the Merchants Warehouse Company, but some of our principals have done so.

CROSS-EXAMINATION.

Expense, of course, is an element in choosing a warehouse. We got the forty-eight hours' free time

and freedom from demurrage at the Merchants Warehouse Company and the Pennsylvania Warehousing & Safe Deposit Company.

Q. Of course, you would not think of taking your business to any warehouse that did not meet those terms, free storage and freedom from demurrage?

A. I said in one of my previous answers, the reason we selected that warehouse in that case.

Q. I am asking you this, other things being equal, you would never think of moving your business to any warehouse while those privileges continued to exist, unless they could give you those same privileges, would you?

A. We have always——

Q. Can't you answer the question? I have asked you the question several times. Won't you please answer it?

A. No; all things being equal, I think that we would have stayed with the Merchants.

RE-DIRECT EXAMINATION.

Q. Have you stayed at the Merchants since those privileges have stopped?

A. To answer you directly; yes.

Testimony of LLOYD V. R. VANNATTA, a witness called on behalf of the defendant, the Merchants Warehouse Company.

DIRECT EXAMINATION.

I am office manager of Alfred Lowry & Brother, wholesale grocers, of 50 North Delaware Avenue. They have a large storage space of their own in addition to space which they have occasion to use in public warehouses. I have been with that company for

twenty-eight years and we have used public warehouse space all through that time. We used to use the Bailey Warehouses, the Terminal Warehouse Company and the Philadelphia Cold Storage, Pennsylvania Warehousing and Safe Deposit Company and possibly some that have gone out of existence.

We have not used any public warehouse except the Merchants Warehouse at Delaware and Chestnut for several years. We found the service that we received from the Merchants Warehouse was of great benefit to us and the location of their warehouse more convenient. We found no difference in the rates charged by the various warehouse companies.

What I meant by the convenience of the Merchants Warehouse was that it is right around the corner from our place of business and very near to the railroads, such as the Philadelphia & Norfolk line, the Reading Company and the Pennsylvania Railroad, Walnut Street Pier 10 South. Our trucks when coming out with outbound shipments through those stations can very conveniently stop at the Merchants Warehouse and pick up small blocks of goods for hauling into our warehouse. We also use a great deal of steamship service from the Pacific Coast.

I did not know about any arrangement between the Pennsylvania Railroad Company and the Merchants Warehouse Company, but I knew that there was forty-eight hours' free time allowed at the warehouse, and I assumed at all warehouses, for unloading of cars, delivered on their sidings. I believe we had that privilege at all warehouses we dealt with. We have the same privilege at the piers and at the railroad stations. Almost all of the goods which we send to the Merchants Warehouse go into storage, with the exception of a small amount which we take up during the free period, to give us sufficient stock.

CROSS-EXAMINATION.

Q. You did haul some in during the free period?

A. Not always, no, sir; occasionally we did.

Q. That forty-eight-hour free period has now been discontinued with the warehouse?

A. I believe it has.

Q. You really don't know much about the other warehouses, do you? You were just assuming, were you not?

A. Well, what do you mean?

Q. I think you said that you assumed so or understood so. Do you know anything about the warehouses?

A. Not to any great extent.

Q. At any rate, if you had a warehouse where you got forty-eight hours' free time and didn't have to pay anything for demurrage in case your cars were detained, you would not go to any other warehouse that could not give you those privileges, would you?

A. Well, I don't know. I really believe that the service we get from the Merchants Warehouse would probably overbalance it.

Q. I mean if the conditions were otherwise equal, of course you would not go to any warehouse that could not give you free time and free storage?

A. Not if it figured greatly in our business.

Testimony of DEANE ATMORE, a witness called on behalf of the defendant, the Merchants Warehouse Company.

DIRECT EXAMINATION.

I am connected with a company of fruit brokers at No. 16 Chestnut Street. The company has been in business about thirty-eight years and I have been with them for ten or twelve years. The warehouses that we have used are the Merchants Warehouse Company,

the Pennsylvania Warehousing and Safe Deposit Company, the Philadelphia Warehouse and Cold Storage Company and the Pennsylvania Cold Storage down on Oregon Avenue. To my knowledge we have never used the Terminal Warehouse Company. Our choice of warehouses has been due to location and convenience of the warehouses and the feeling that our products were in safe hands. The rates at the Merchants Warehouse and the Pennsylvania Warehousing and Safe Deposit Company are about the same. Of course the cold storage rates are considerably higher. We have been solicited at lower rates by the Bailey Warehouses, but we have not transferred our business to them.

I did not know of the contracts between the Pennsylvania Railroad and the Merchants Warehouse Company, although I knew that there was some arrangement between them.

Q. Have you ever got any different treatment as far as free storage for forty-eight hours or as far as free unloading was concerned, anyone of these warehouses as compared with another?

A. No. Of course, a lot has to be hauled in by team, as far as we are concerned.

Q. But between the Pennsylvania Warehouse and the Merchants Warehouse, was the treatment the same?

A. Approximately.

Q. Have you ever had occasion to use the privileges of these warehouses for unloading cars on the track without paying demurrage?

A. We would not be interested. As brokers, we would have ten customers, or more, and if they have a solid carload, we are anxious to get away with it.

Q. You want to get the cars unloaded?

A. Yes, sir.

Q. Have you had occasion to use the finance facilities of the Merchants Warehouse?

A. Yes, sir; both for ourselves and our principals.

CROSS-EXAMINATION.

A very fair proportion of our warehouse goods go into storage and the remainder are delivered straight to customers. In that case we paid nothing for the service. We were never interested in going to any other warehouse.

Q. But, of course, you would not go to any warehouse that could not give you those privileges, the forty-eight hours' free time and no demurrage?

A. We were never interested.

Q. Assuming other conditions being equal, of course you would not go to a warehouse that would not give you those privileges?

A. We could get the same facilities from a railroad station. I mean, if we were interested in having the merchandise immediately on the arrival of the car in Philadelphia; if an entire load had been shipped, we could very easily get it at a railroad station anywhere in town.

Q. If it was all coming to the same person, is that what you mean?

A. Yes. Lots of times goods are shipped to us on consignment.

Testimony of C. HERBERT BELL, a witness called on behalf of the defendant the Merchants Warehouse Company.

DIRECT EXAMINATION.

I am in the flour business with Samuel Bell & Sons. Until 1932 we were the Philadelphia distributors for the Washburn-Crosby people. We have been in business for forty-three years. Our office is at Fourth and Market Streets. We have used practically all the warehouses in Philadelphia. We have used the Terminal Warehouse Company.

Our principal point of distribution was the Shackamaxon Warehouse of the Merchants Warehouse Company. However, when customers wished deliveries at any specified place, we shipped a car to any warehouse that they called for. We chose to deal principally at the Shackamaxon Warehouse of the Merchants Company because of the location of the house, the service and the suitability of the house for storing flour. You must have a very dry, airy house, which must be ventilated and clean. Flour takes up odors very easily from other substances, and it must be properly segregated. We considered the Shackamaxon house the best flour house in Philadelphia.

We were given forty-eight hours' free time at all the warehouses in Philadelphia and also at the railway stations, so that this privilege was not a factor in our choice of a warehouse. The same flour rates prevail throughout all of the warehouses—that is the rates prescribed by the Commercial Exchange. The greater part of our flour goes into storage and is not delivered within the forty-eight-hour period. We have had no occasion to take advantage of any freedom from demurrage. We have always been anxious to get our cars in.

I am a stockholder of the Merchants Warehouse Company. However, this had no bearing on our choice of the Merchants Warehouse Company.

CROSS-EXAMINATION.

Of course all other things being equal, you would stay with your own company.

Q. You were familiar, I think you said, with the forty-eight hours' free time arrangement whereby if the flour that comes to you was taken out of the warehouse within forty-eight hours, you paid nothing for the unloading or for the handling in the warehouse, or for storage; is that right?

A. Yes.

Q. Also, you paid no demurrage for cars detained on the tracks to the Merchants Warehouse?

A. No.

Q. Do you know what percentage of the receipts of flour at the warehouse are taken away within this free storage period?

A. No; I couldn't give you the percentage; it's rather small, I should say, but we used it as much as we could.

Q. Who is Samuel Bell, Jr.?

A. My father.

Q. Did you ever see a letter that he wrote, dated August 1, 1913, to Mr. George Dallas Dixon, in charge of traffic, Broad Street Station, Pennsylvania Railroad?

A. No, sir; not that I know of.

Q. I show you a copy of the letter, and ask you if you recollect having seen it. Suppose you read it through and see if it refreshes your recollection as to having seen it before. Your father was in the same business as you are, was he not; Samuel Bell & Sons?

A. Yes, sir.

Q. Were you connected with the business at that date, in 1913?

A. Yes, sir.

Q. Do you remember seeing the letter?

A. No; I don't recall seeing the letter. It seems to be a plea for storage rates—a reduction in storage rates.

Q. And it is also a plea for increased payments by the railroad?

A. To the Warehouse Company; yes.

Q. So that you could get cheaper rates, you being connected with the warehouse?

A. Yes; I suppose it is a request for an increase in the Warehouse Company, for the purpose of reducing flour rates in Philadelphia.

Q. That's right.

A. The Exchange was interested in that matter of having flour rates reduced. It took some steps towards having rates reduced.

Q. And that you were seeking to get by asking the railroad to increase its allowances to the Warehouse Company?

A. Well, as I say, the Exchange took steps. I think other people in the Philadelphia Exchange and the flour trade made this request to Mr. Dixon.

Q. I just call your attention to the statement in there, that 75 per cent. of your product was taken away within the free time. Does that agree with your recollection at that time?

A. No. At one time, I am not just sure of the date, the free storage time was ten days. Now, that might have been so at that time.

Q. No; that isn't so. The contracts that were offered in evidence showed only two days at that time.

A. Well, I am not sure of a time. That might apply to the business in general, but it certainly didn't apply to our business. I can testify to that.

Q. You think that your father was mistaken, that 75 per cent. was removed within the free time?

(Witness reading letter.)

Q. That didn't refer to your business only?

A. It didn't refer to our business at all.

Q. The general business of the Merchants Warehouse, I see.

(No answer.)

Q. Was your father an officer of the Merchants Warehouse at that time?

A. Yes.

Q. What position did he hold?

A. Vice-president.

Q. So that he was really writing on behalf of the warehouse in that letter, I presume?

A. Well, I can't say that entirely, because I recollect personally being a member of the committee, the flour committee of the Exchange, and several times agitating for reduced rates. I several times talked the matter of rates over with Mr. Samuel Bell, and it is quite likely on behalf of the trade that he made that request. Of course, in the first place, the Exchange would take it up with the warehouse; I suppose it would be the warehouse.

Q. This letter evidently was written subsequently to an interview that your father had with Mr. Dixon, as disclosed in the last paragraph?

A. Yes.

Q. As a matter of fact, your cars have oftentimes been detained on the railroad tracks for several days beyond the free time?

A. Not to my knowledge.

Q. I am now handing you Plaintiffs' Exhibit No. 19, containing a record of cars detained on the tracks at Shackamaxon stores during the month of March, 1926. I think you will find that in one month eleven cars consigned to Samuel Bell & Sons were detained for various periods, some of them being as high as fourteen days. Would that be an unusual situation in your business?

A. No; if the warehouses were filled or if the freight movements were very heavy; we have often had difficulties in getting our cars in.

Q. You think that was probably not an unusual situation all through the period?

A. No; because we knew our flour was ordered from the mill to the warehouse, and when it arrived there it was taken into stock. There was no reason why it should not be taken right into stock.

Testimony of HOWARD S. BEVAN, a witness called on behalf of the defendant, the Pennsylvania Railroad Company.

DIRECT EXAMINATION.

I am special agent, handling demurrage matters for the entire Pennsylvania Railroad system. Ordinarily under Rule 27 of the official classification, the consignee and consignor are required to unload and load carload freight and heavy or bulky less than carload freight that is impractical for station employees to handle. But by exception to Rule 27, the railroad employees will load and unload such freight at a great many stations of the Pennsylvania Railroad in Philadelphia. And under Pennsylvania Railroad I. C. C. 10,000, the warehouses of the Merchants Warehouse Company were likewise excepted from the general rule, as stations at which the unloading and loading would be done by the railroad employees.

Testimony of J. L. WEBB, a witness called on behalf of the defendant, the Pennsylvania Railroad Company.

DIRECT EXAMINATION.

I am superintendent of station transfers of the Pennsylvania Railroad Company, Eastern Division. I have held that position for ten years. I am familiar with the operation of freight and passenger stations of the Pennsylvania Railroad. During the period from 1926 to 1931, inclusive, the average cost to the Pennsylvania Railroad Company of unloading carload freight at its own stations in Philadelphia was 61.5 cents per ton.

Testimony of C. L. FRANCE, recalled on behalf of the defendant, the Pennsylvania Railroad Company.

DIRECT EXAMINATION.

I checked over the reports made by Mr. Rissinger submitted in evidence here as Plaintiff's Exhibits Nos. 19 and 20. I found a number of errors in the report as to detention of cars, the most conspicuous of which is a car from Buffalo in February, 1930, for which Mr. Rissinger's report shows a detention of 176 days. The original records, which I have with me, show that the car was released on February 7th, or three days after its arrival on February 4th. There were numerous other errors. I have listed them on eight typewritten sheets. There are about 100 items.

CROSS-EXAMINATION.

Q. Have you it summarized?

A. No; I haven't it summarized.

Q. Are all of the corrections on these three sheets?

A. We have eight sheets, Mr. White.

Q. Yes; I understand, but the figures that Mr. Rissinger had in his record were secured from the records which were shown to him, and in going back of those records you found some errors?

A. No. With few exceptions they were errors in taking off the record. You will find that where the record is taken off, it is complete, and we verified it and a notation was made on the sheet.

Q. In some of these cases the cars were detained longer than Mr. Rissinger's report showed?

A. Yes, sir; in one or two instances they were.

Q. And in some cases not quite so long?

A. Correct.

Q. The substantial difference is not very great?

A. I wouldn't say that now without refreshing my memory from those sheets.

RE-DIRECT EXAMINATION.

By MR. BARNES:

Q. What about the inclusion of Sundays and holidays in these delays? Have you anything to say about that?

A. The report is worked up from the arrival of the car until the unloading of the car.

Q. Right.

A. In other words, if I may say, the detention that has been put there would not be used in any instance for demurrage purposes.

Q. Why not? You have not explained that.

A. For this reason, the demurrage report is based on a notice. That (indicating) is based on arrival. There are other records that are taken from an office delivery sheet for the arrival date, and the delivery sheet for the release date. Now, that may be right or it may be wrong. In other words, the records, as they appear there (indicating), would probably be a basis to get at the correct figures.

RE-CROSS-EXAMINATION.

By MR. WHITE:

Q. The real difficulty about collecting this material was that the records of the Railroad Company did not show any demurrage charged against any cars detained, which had been consigned to the Merchants Warehouse?

A. The cars were not subject to demurrage.

Q. I know that.

A. And there were no records set up.

Q. Therefore, it was necessary to go to other records to get the record clear?

A. Yes, sir.

Testimony of CLARENCE L. MOORE, a witness called on behalf of the defendant, the Pennsylvania Railroad Company.

DIRECT EXAMINATION.

I am chief clerk of the superintendent of transportation of the Reading Company. I supervise all the details of the work of the transportation department. I am familiar with the stations of the Reading Railroad in Philadelphia and with the warehouses.

Demurrage would ordinarily be assessed on cars at stations or sidetracks after forty-eight hours from the date of notice to the consignee, except where the tariff exception providing for unloading of cars by the railroad applies. That covers warehouses such as the Pennsylvania Warehousing and Safe Deposit Company, and the Philadelphia Cold Storage Company at Broad and Callowhill Streets, and Port Richmond, and Willow and Noble Streets. Where cars are consigned to or shipped by any of these warehouses, no demurrage charges are made.

CROSS-EXAMINATION.

We did charge the Terminal Warehouse Company demurrage for the detention of cars delivered to it and there was an arbitrary charge of $5 per car per day, Sundays and holidays excepted, beginning the sixth day after the arrival notice was sent.

Testimony of W. C. GLYNN, a witness called on behalf of the defendant, the Pennsylvania Railroad Company.

DIRECT EXAMINATION.

I am assistant freight manager of the Pennsylvania Railroad Company and have held that position since June, 1932. I have with me tariffs providing for

the unloading and loading by the carriers at stations in Philadelphia, and the tariffs providing that certain freight stations of the Pennsylvania Railroad include certain facilities of the Merchants Warehouse Company.

Pennsylvania Railroad Tariff C. O. I. C. C. 14,370, effective December 1, 1925, provides at page 59 that package freight carried at carload rates will be loaded or unloaded by the carrier at the stations in Philadelphia specified below, except where handled to or from cars on team tracks at owner's request. The stations referred to are Vine Street, Walnut Street Wharf, Dock Street, Federal Street, Broad Street and Washington Avenue, Thirtieth and Market Streets, Shackamaxon, Kensington and Ontario Streets, Fairhill and North Philadelphia. Supplement 47 of this tariff, effective July 1, 1927, added the Pennsylvania Produce Terminal as a station. Supplement No. 61, effective March 1, 1928, made the additional provision "The term package freight does not include automobiles and other motor vehicles." That's the first time that item appeared in the tariff.

Pennsylvania Railroad G. O. I. C. C. No. 10,000, effective November 1, 1929, item 365, provides that Kensington Station, Philadelphia, includes all facilities of the Merchants Warehouse Company No. 3. Item 369 on page 61 of the same tariff, provides that Shackamaxon, Philadelphia, includes all facilities of the Merchants Warehouse Company No. 4. Merchants Warehouse Company No. 4 is under the designation of Shackamaxon Station, but is a delivery separate and distinct from Shackamaxon. On page 89 of the same tariff is the provision that Station 1040, Federal Street, Philadelphia, includes all the facilities of the Merchants Warehouse Company Nos. 7 and 8. Merchants Warehouse Company No. 7 is under the jurisdiction of the Federal Street Station and occupies the

upper floors of the inbound freight house. Merchants Warehouse Company No. 8 is under the jurisdiction of the Federal Street Station, but is a delivery separate and distinct from Federal Street, and shipments in carloads and less than carloads can be handled at this warehouse. Item 7001 on page 234 of the same tariff provides as follows: Broad and Washington Avenue Station, Philadelphia, includes all facilities of the Merchants Warehouse Company No. 1 (flour). Merchants Warehouse No. 1 is under the jurisdiction of the Broad and Washington Avenue Station, but is a delivery separate and distinct from the Broad and Washington Avenue Station.

The arrangements described in these tariffs continued until June 23, 1931.

All stations I have just referred to are public freight stations of the Pennsylvania Railroad Company. The tariffs I have read from were duly filed with the Interstate Commerce Commission, and subject to the inspection of anyone who wished to see them.

CROSS-EXAMINATION.

The Pennsylvania Railroad Company has about two thousand local freight agents throughout its system. The tariffs from which I have just read were distributed to all of these agents. They were open to the inspection of people who were going to ship to Philadelphia.

Testimony of ERNEST V. D. SULLIVAN, recalled for further cross-examination.

CROSS-EXAMINATION.

Witness is shown one of the five volumes prepared by him as supporting data on which he based his calculation of the amount which the Terminal

Warehouse Company had received for handling certain freight during the period covered by the suit, and the amount which he alleged it should have received for handling the same freight.

Q. What do you mean by "handling service"?

A. "Handling service", of course embraces many factors of service beyond the plain unloading of the car. It also includes the separation as to marks and brand and sizes. It also includes the elevation of the merchandise to the storage. It also includes the subsequent selection of that merchandise in accordance with the orders of our customers for distribution. It includes the marking of the merchandise if it is to be reshipped either by motor truck or by rail or steamship. It includes the reporting of the serial numbers or weights of the commodities that we ship for our customers, and innumerable things that are all embraced under the general category of handling.

Q. And how much of that service was paid to the Merchants Warehouse by the Pennsylvania Railroad, if you know, under this contract; just the unloading, wasn't it?

A. Oh, no. They did a complete distribution service on shipments that arrived at their warehouse, whether it went out in twenty-four or forty-eight hours or six months afterwards.

Q. The service that you are describing here is handling service, in your judgment, the same thing that the Pennsylvania Railroad paid the Merchants Warehouse Company fifty cents for unloading?

A. For handling. The Pennsylvania Railroad paid a portion of the probable cost of handling these particular shipments.

Q. What I am trying to get in my mind, and I am asking you only for information, because I want to understand this, is the relationship in your mind between what is in these volumes and the thing that you

complain of, namely, the payments that were made by the railroad to the Merchants Warehouse Company. Will you make that clear?

A. These shipments are all comparable.

Q. That may be, but I just want it so that I can understand, because I am awfully dumb at figures. The Merchants Warehouse Company got fifty cents a ton, we will say sometimes thirty-five, but fifty cents a ton, we will say, for doing what, as you understand it?

A. For performing—in accordance with the tariff, they were only supposed to unload cars.

Q. Yes.

A. However, in accordance with the actual practice, what they did, they unloaded the car, they sorted the contents of the car in accordance with brands, and made split deliveries to something like eight, ten or fifteen consignees, within the forty-eight hours, presumably the free storage period without making any charge to the owner of the merchandise.

Q. In other words, the Warehouse Company did a great many things, therefore, for their patrons that they were not paid for by the railroad company under the contract; that is right, isn't it?

A. Well, they were paid fifty cents a ton. Now, how they used that, the fifty cents a ton, of course I don't know.

Q. I am trying to find out what the comparison is between what you are asking this jury to consider as to your charges here and what the Merchants Warehouse Company got from the Pennsylvania Railroad. Do you follow me?

A. I missed your point, Mr. McCracken.

Q. I will try it again. You come in here and say, I have got five volumes to show, first, what I ought to have got for doing certain work, and second, what I did get?

A. That's correct.

Q. And you say to the jury, I think I ought to be paid by these people the difference, because of some things they did over this period? That is what you say?

A. Yes.

Q. Now, for all this work that you did, for which you think you ought to have gotten this money, was unloading a car, handling the contents and sorting, and what else?

A. All the various services I mentioned a few minutes ago. The handling, which I mentioned a while ago, which embraces all the various factors of handling, which as I said before, included all the details of unloading the car, of assorting it as to brands, marks and sizes, the elevation to the storage space of that portion that would go into storage, and the sorting of it on the storage floor, in accordance with the brands, marks and sizes; the work of the clerk in making a record, the keeping of the merchandise in store for these particular customers, the reporting of the delivery, the reporting of the marks, weights and numbers on the commodity, that require that particular service, the marking of the cartons or cases, the packing of it, the reloading into cars, in either carloads or less than carload lots, the securing of signed bills of lading from the carrier and the subsequent mailing of them to our customers, and quite a few other miscellaneous services, also.

Q. Let me show you the contract that the Merchants Warehouse Company had with the Pennsylvania Railroad and the payments that were made under that contract, and let us see how close that comes to what you are talking about. I am reading from page 50; I picked out one of these contracts at random.

"To pay to the said Warehouse Company, for all services rendered by it in and about the receipt and delivery of freight, both incoming and outgoing, the amounts following:—Three and one-half (3½) cents per barrel for each barrel of flour up to fifty thousand (50,000) barrels per month; two and one-half (2½) cents per barrel for each barrel over the said fifty thousand (50,000) barrels per month and thirty-five (35) cents per ton (of two thousand pounds) for each ton of merchandise."

Now, did that service rendered by it, in and about the receipt and delivery of freight, both incoming and outgoing include all those things you are talking about?

A. As to how the Merchants Warehouse allocated the allowances it received from the Pennsylvania Railroad, of course, I don't know, Mr. McCracken.

Q. Certainly not, but let me ask you this question: Suppose you had that contract with the Pennsylvania Railroad, would you have considered it to include all those things we have been talking about, under its terms?

A. I could use that allowance to lower my charge to my patrons for all the service that I mentioned as having been performed.

Q. I understand but that is not the point. What would you have considered that you were paid for by that thirty-five cents a ton under that contract?

A. Bear in mind that the Merchants Warehouse made an additional charge on merchandise that stayed in the warehouse beyond the forty-eight hour period.

Q. I am not asking you about that. Would you have considered that that thirty-five cents a ton was intended to and did pay you and was the only pay you expected to get from that company for all these

things, in connection with unloading, branding and distributing that we have been talking about. Would you have considered it that way?

A. I don't really get the point of your question.

Q. You have told us that what you are claiming for here is not only the unloading of the car, but also the distributing of it, and branding it, and sending out notices about it and other things that you have mentioned. You have complained that the Merchants Warehouse Company was paid by the Pennsylvania Railroad to do certain things, one of which is clearly the unloading of the car; that is right, is it not?

A. Yes; that's right.

Q. What else do you think that the charge, which was made by the Warehouse Company, to the railroad, was covered in that charge?

A. You miss the point of my complaint, Mr. McCracken, because one of the complaints that we made was that they used that fifty cents allowance to shrink what would be a normal handling charge, which they would have had to assess their patrons who used their facilities for the services I just have enumerated.

Q. Has it not come down to this, through the questions of counsel to the witnesses, that they did not charge anything for unloading or anything else, if the goods went out in forty-eight hours?

A. That's correct. Whatever services they performed in connection with the unloading and the subsequent delivery of the freight in the forty-eight hours, according to the witnesses that testified here on their behalf, there was no charge made. However, there were certain items of service that they also made and charged for within that period.

Q. Such as?

A. Well, I have got a couple of quotations here (indicating). It is light density stuff, and probably

not very attractive from the tonnage standpoint. Here is one for illustration——

THE COURT: There is no objection to this line of cross-examination and I do not like to interfere, but my objection to all argumentative cross-examinations is that they have no end, and I do not see where they help any. All you get out of the witness is his construction and his opinion about these things.

MR. MCCRACKEN: If your Honor please, may I just turn to a page here and ask him about it, and then I am through?

THE COURT: I am not shutting you out, but my experience has been that in argumentative cross-examination, it never ends.

MR. MCCRACKEN: I agree with that, but this man has come in here with certain claims for damages.

THE COURT: I do not exclude it.

By MR. MCCRACKEN:

Q. Let us turn to the second page, which is canned goods. There has been a lot of stuff about canned goods; this page now (indicating), which goes back to 1926, October 22d, and it shows a car of canned goods that came in from Forestville, New York, over the Erie Railroad, weighing 5200 pounds, does it not? That is right, is it not?

A. This came over the Pennsylvania Railroad.

Q. The car initial is Erie?

A. Yes; the car initial is Erie.

Q. All right. It came over the Pennsylvania Railroad. Now, you have got three columns here, which are given at 100 pounds; that is, you have measured those three at 100 weight and not a ton, have you?

A. Yes, sir.

Q. Now, you have one contract which shows the contract rate. Is that the rate which you got?

A. That's the rate we actually got.

Q. That is, 3.077 cents per 100 pounds?

A. Yes.

Q. Now, you didn't get what you call the normal rate, which is shown as seven cents per 100 pounds for the canned goods?

A. Not on that particular lot (indicating).

Q. There is another one for canned apples, page 910; two cars came in from Pittsburgh. Your contract rate there is given as 4.44 cents?

A. That's right.

Q. And your normal rate that you think you ought to have got was seven and one-half cents?

A. That's correct.

Q. Here is one for flour, that's another thing. Here is a car that came in from Minneapolis, and the rate that you got was 7.476, and the normal rate that you say you ought to have gotten was ten cents; is that right?

A. Yes.

Q. That is not what was testified to here yesterday?

A. Just one moment, please.

Q. All right. On this you have the word "flour"?

A. That is prepared flour. It comes in cartons. That is not the ordinary flour that was discussed here yesterday. That comes in 98 pound bags.

Q. A little harder to handle?

A. Very much harder to handle.

Q. Now, we come to one of the other goods, an page 948, tomato soup.

A. That is a specialty canned goods account. That isn't ordinary canned vegetables that comes in a thousand cases of one particular brand. This particular account may have 100 different separations to the car,

and there was a lot of detailed service in connection with the handling of this particular account.

Q. You say that in that case your contract rate was 5.0565 and that what you ought to have been paid was eight and one-half cents?

A. Yes, sir.

Q. Eight and a half cents on 100 pounds weight would be on 2000 pounds about $1.70 a ton. That is what you think you ought to have had?

A. Absolutely.

Q. And that is only incoming? It didn't have anything to do with outgoing?

A. That included our charge for outgoing. In other words, we made no charge for outgoing to our customers.

Testimony of WARREN T. JUSTICE, a witness called on behalf of the defendant, Merchants Warehouse Company.

DIRECT EXAMINATION.

I am vice-president and general superintendent of the Pennsylvania Warehousing and Safe Deposit Company. I have been with that company for thirty-one years. I heard the testimony of the preceding witness as to the rates which he stated to be so-called normal rates. In the history of the business I have never heard of anyone getting such rates as he stated—or even getting within gunshot of such rates.

CROSS-EXAMINATION.

Q. Do you know anything about the shipments that Mr. McCracken asked Mr. Sullivan about—the nature of them?

A. Yes, sir.

Q. What do you know about them? What kind of shipments were they?

A. They were carloads of merchandise coming in and going out and smaller lots, I presume, by the way he reported; taking the cars and weights and numbers.

Q. Is there any tariff in effect today in Philadelphia?

A. Yes, sir.

Q. Aren't there plenty of rates in the code that are comparable with the rates that Mr. Sullivan has mentioned?

A. I think not.

Q. Have you the tariff rates with you?

A. Have I what?

Q. Have you got a copy of the code with you?

A. No, I haven't.

Q. You do, however, now have in effect a regular code of the prices, approved by one of these alphabetical concerns; the N. R. A., is it?

A. That has not been approved by the N. R. A.

Q. It has not?

A. No, sir. It is subject to approval by the N. R. A.

Q. Is it in effect?

A. Yes, sir.

Q. Can you bring a copy of that book back after lunch?

(No answer.)

MR. MCCRACKEN: I think we may be able to find one here, Mr. White.

By MR. WHITE:

Q. I show you the Tariff No. 1 of the Merchants Warehouse, effective March 12, 1934. Will you take this item marked by pencil here, and tell me what is the rate per ton according to that code. That is sardines in tins, I believe it is.

MR. MCCRACKEN: Of course, if the Court please, he is now going to show him a code of the

N. R. A., which became effective in 1934, as governing prices between 1926 and 1931, and we know that all codes have raised prices. I do not object; I just call attention to it.

By Mr. White:

Q. What would that amount to per ton?

A. $1.

Q. Now, then, will you read the fine print down at the bottom?

A. The average rates applying on merchandise going into storage where there are not more than five assortments per shipment which require separate piling in warehouse. Where there are six or ten assortments per load, the average rates are increased twenty-five cents. Where there are eleven assortments per load, the average rates are increased fifty cents. Where there are over twenty assortments per load the average rates are increased 100 per cent.

Q. Now, you heard Mr. Sullivan's testimony in that particular car, which Mr. McCracken was asking about. The average was seventy-five or 100 assortments in that car?

A. Yes, sir; he was speaking of canned tomatoes.

Q. And the average rate worked out at $1.70, and yet you say you never heard of a rate that high.

A. I have never seen the Merchants Warehouse charge that.

Re-Direct Examination.

By Mr. McCracken:

Q. What is that code?

A. Merchandising freight code.

Q. Effective?

A. May 12th.

Q. For the first time?

A. Yes, sir.

Q. From your knowledge of the business, are the prices set forth in this code higher or lower than the prices in question from 1926 to 1931? Take flour, for instance, Mr. Justice, and see if you can find that.

A. The rate on flour is practically doubled.

Q. Double to what it was when?

A. During the period of 1926 to 1931.

Q. All right; find something else.

(No answer.)

By Mr. White:

Q. What is the rate on flour in there?

A. The rate per barrel is 8.4 cents storage, thirteen and one-half cents labor.

Q. Now, as a matter of fact, all during the contract period it was eight cents storage and nothing for handling; that is right, is it not?

A. That is right.

Q. That is because these allowances were paid by the Pennsylvania and the Reading Railroad?

(No answer.)

Mr. Barnes: Now, Mr. White, you are asking him to draw a conclusion.

Mr. White: He is the man that has the contract we have been talking about.

By Mr. White:

Q. That's the reason these people paid nothing, because you got the allowances?

A. When goods came in by truck, there was no labor charge whatever.

Q. I am asking you, the only way you could handle that article at that rate was because you got the allowance?

A. Yes, sir.

By MR. MCCRACKEN:

Q. You say the labor charge was 13½ cents?

A. Yes, sir.

Q. Per what?

A. Per 225 pounds.

Q. The contract read to Mr. Sullivan was 3½ per barrel for 196 pounds, wasn't it?

A. Yes, sir.

Q. Now, can you find anything else to show that these prices were higher or lower than during the period here in suit? Do you find newsprint there?

A. Fifty cents per ton of 2000 pounds storage, and 40 cents labor.

Q. That comes to 90 cents?

A. Ninety cents.

Q. You are familiar with the codes that have been promulgated in the industry?

A. Yes, sir.

Q. You hold what position, if any, as representative of the industry in applying the code here?

A. I am the code member for Region No. 2.

Q. Now, you have been going on with all these negotiations with Washington, have you?

A. Yes, sir.

Q. Then you can testify from your intimate knowledge, which I assume you have with respect to these codes, whether the prices went up or down in handling this merchandise?

A. Went up.

Q. Did they go up appreciably?

A. Very much appreciably.

Q. Over the period from 1926 to 1931?

A. Yes, sir.

RE-CROSS-EXAMINATION.

By MR. WHITE:

Q. You mean that the prices for handling in this code were more than they were during the period covered by this suit?

A. Yes, sir.

Q. Why, of course, they are, because you don't get any allowances from the Reading Railroad any more; that is perfectly clear, is it not?

A. We are paying very much more for labor under the code, too.

(A map showing the location of public warehouses in Philadelphia and the railroad tracks serving them was offered in evidence and marked Defendants' Exhibit No. 9.)

(A circular entitled "Unique," being a circular issued by the Terminal Warehouse Company, was offered in evidence and marked Defendants' Exhibit No. 10.)

(A page appearing in the magazine "Distribution and Warehousing," of September, 1931, relative to the Terminal Warehouse Company, offered in evidence as a physical exhibit and marked Defendants' Exhibit No. 11.)

MR. BARNES: If the Court please, defendants offer in evidence, and I understand counsel for the plaintiff does not object, certified copy of the complaint and answers and order of the Interstate Commerce Commission in a certain proceeding:

James Gallagher et al. v. the Pennsylvania Railroad Company, filed April 26, 1928;

Walter A. Bailey et al. v. Baltimore & Ohio Railroad Company, filed April 26, 1928;

Rex & Company, Inc., et al. v. Reading Company, filed April 26, 1928;

Petition of Merchants Warehouse Company for leave to intervene and order of Commission entered June 27, 1928, permitting the same;

Petition filed February 26, 1930, answer of the Pennsylvania Railroad Company to said petition, and order of the Commission entered June 1, 1931, in cases No. 20968, James Gallagher et al. v. the Pennsylvania Railroad Company, No. 20968 (sub No. 1) Walter A. Bailey et al. v. Baltimore & Ohio Railroad Company, and Docket No. 20968 (sub No. 2), Rex & Company, Inc. et al. v. Reading Company, duly certified as records of the Interstate Commerce Commission; and the complaint, answer, and order of the Commission in the proceeding entitled James Gallagher et al. v. Pennsylvania Railroad Company, Docket No. 23790;

The opinion and findings and order of the Interstate Commission in the matter referred to in the certified copy, which I have offered in evidence, 160 Interstate Commerce Commission reports, page 563.

The next is the opinion of the Statutory Court in the same matter, 44 Federal Reporter, 2d, 379, a certified copy of the order of the Statutory Court and the petition for an order of supersedeas; and, finally, the opinion of the Supreme Court of the United States in the same proceedings with the same parties named in those certificates, reported in 283 United States Reports, page 501.

(Papers in question marked Defendants' Exhibit No. 12.)

(A supplement dated August 2, 1926, to the agreement between the Baltimore & Ohio Railroad Company and the Pennsylvania Warehousing and Safe Deposit Company, and a letter bearing the same date from the president of the Baltimore &

Ohio Railroad Company, Archibald Fries, to Mr. George H. Earle, Jr., of the Pennsylvania Warehousing and Safe Deposit Company, and Mr. Earle's reply, were offered in evidence and marked Defendants' Exhibit No. 13.) The said papers read as follows:

AGREEMENT Between the Baltimore and Ohio Railroad Company, the Baltimore & Philadelphia Railroad Company, the Schuylkill River East Side Railroad Company, and the Pennsylvania Warehousing and Safe Deposit Company, August 2, 1926, Covering certain modifications of the terms and conditions expressed in agreements of April 10th, 1897, March 31st, 1902, August 22nd, 1904, and July 1st, 1911, with the Warehousing Company, Philadelphia, Pa.

Office of the Secretary B. & O. R. R. Co., Baltimore, Md.

AGREEMENT.

Date and Parties.

This agreement made this Second day of August, 1926, between the Pennsylvania Warehousing and Safe Deposit Company, hereinafter called "Warehousing Company", and the Baltimore and Ohio Railroad Company, The Baltimore and Philadelphia Railroad Company and the Schuylkill River East Side Railroad Company, hereinafter called collectively "Railroad Companies".

Prior Contracts Modified.

Whereas under date of April 10, 1897, a certain agreement was entered into between the Pennsylvania Warehousing and Safe Deposit Company, The Tradesmen's Grain, Elevator and Storage Company, the Baltimore and Ohio Railroad

Company and John K. Cowen and Oscar G. Murray, Receivers, which was supplemented by an agreement between the Pennsylvania Warehousing and Safe Deposit Company and the Baltimore and Ohio Railroad Company dated March 31, 1902, and by an agreement between the Pennsylvania Warehousing and Safe Deposit Company, the Baltimore and Ohio Railroad Company, the Baltimore and Philadelphia Railroad Company and the Schuylkill River East Side Railroad Company dated August 22, 1904, and by an agreement between the Pennsylvania Warehousing and Safe Deposit Company, and the Baltimore and Ohio Railroad Company, the Baltimore and Philadelphia Railroad Company and the Schuylkill River East Side Railroad Company dated July 1, 1911, and,

Whereas it is desired to modify certain of the terms and conditions expressed in said agreements in the respects hereinafter mentioned.

Now, therefore, in consideration of the premises it is hereby agreed between the parties as follows:

OPTION ON 23RD ST. STORES EXTENDED.

1. The obligation of the Railroad Companies to take over the plant of the Warehousing Company at Twenty-third and Race Streets in the City of Philadelphia, and known as the Twenty-third Street Stores, as provided in the agreement of April 10, 1897, at the price of Two hundred and fifty-two thousand five hundred and ninety-nine dollars and twenty-six cents ($252,599.26) which was fixed by the supplementary agreement dated August 22, 1904, the time for the fulfillment of which obligation was extended until April 10, 1927, by agreement between the parties hereto dated

July 1, 1911, is hereby extended to April 10, 1932. It is agreed, however, that the Railroad Companies shall have the option of taking over the property at any time within the extended period upon giving one year's notice of their desire to exercise their option, the year for the purpose of said notice beginning April 10th in any year.

REMOVAL OF GRAIN ELEVATOR—CONST'N OF ONE-STORY WAREHOUSE IN LIEU.

2. It is agreed that the grain elevator building of the Warehousing Company which is a part of the property to be purchased and taken over by the Railroad Companies under the agreement of April 10, 1897, aforesaid and therein referred to as that to be purchased by the Warehousing Company from the Tradesmen's Grain Elevator and Storage Company, may be torn down and removed by the Warehousing Company, and it is further agreed that the Warehousing Company may erect upon the site of the said grain elevator, a one-story warehouse building of such design, character and costs as shall meet with the approval of the Railroad Companies. The said warehouse building, if and when erected shall be included in the property to be taken over by the Railroad Companies under the said agreement of April 10th, 1897, in lieu of the elevator.

COST OF ONE-STORY WAREHOUSE ADD'L.

It is further understood and agreed that the cost of said one-story warehouse building if erected shall be in addition to the sum already fixed by the said agreement of April 10, 1897 and supplemental agreement of August 22, 1904, and that any and all sums received by the Warehouse

Company as salvage from the elevator shall be considered as a credit and deducted from said sum.

MINIMUM TONNAGE GUARANTEE CANCELLED—TERMINAL ALLOWANCE IN LIEU.

3. It is further agreed that all provisions of the aforesaid contracts with respect to the obligation of the Railroad Companies to guarantee a minimum tonnage are hereby cancelled. In lieu thereof the Railroad Companies agree to pay to the Warehousing Company as a terminal allowance for the facilities to be afforded as provided in and by the aforesaid agreements, fifty cents ($.50) per net ton of two thousand (2,000) pounds for every net ton moved into or out of the Twenty-third street Stores of the Warehousing Company, over the lines of the railroads of the Railroad Companies on which they receive a road haul instead of the thirty-five cents ($.35) per net ton as in said agreements mentioned so long as any other railroad in Philadelphia competitive with the Baltimore & Ohio, shall make similar allowance to other Warehouse Companies in Philadelphia competitive with the Pennsylvania Warehousing & Safe Deposit Co. unless sooner estopped from making such allowance by a decision or order of the Interstate Commerce Commission, the Public Service Commission of Pennsylvania, Court of Competent Jurisdiction or by law.

CANCELLATION AND PURCHASE IF ALLOWANCE CEASES.

In the event the 50¢ allowance referred to above ceases, the Warehouse Company shall have the right to cancel this agreement on three months' notice, and in that case the Railroad Company shall

purchase, under the terms above referred to, the warehouse property, within one year from the expiration of such notice of cancellation.

EXCEPT AS MODIFIED, PRIOR CONTRACTS IN EFFECT.

4. Except as hereby modified the aforesaid agreements between the parties hereto remain in effect in accordance with the terms thereof.

In testimony whereof the parties hereto have caused this agreement to be executed by their respective Presidents or Vice-Presidents and their corporate seals to be attached, attested by their respective Secretaries or Assistant Secretaries the day and year first above written.

The Pennsylvania Warehousing & Safe Deposit Company, by George H. Earle, Jr., President. Attest: E. W. Oeseher, Secretary. (Corporate Seal.) The Baltimore and Ohio Railroad Company, by Archibald Fries, Vice President. Attest: G. F. May, Asst. Secretary. (Corporate Seal.) The Baltimore and Philadelphia Railroad Co., by Archibald Fries, Vice-President. Attest: G. F. May, Asst. Secretary. (Corporate Seal.) The Schuylkill River East Side Railroad Co., by Archibald Fries, Vice President. Attest: G. F. May, Asst. Secretary. (Corporate Seal.)

THE BALTIMORE AND OHIO RAILROAD COMPANY

BALTIMORE, MD.

ARCHIBALD FRIES, VICE-PRESIDENT, TRAFFIC AND COMMERCIAL DEVELOPMENT

August 24, 1926 A. 3540.

The Pennsylvania Warehousing &
Safe Deposit Co.
Philadelphia, Pa.

Attention Mr. Earle

Interpretation of Parts of Contract of 8-2-26

Gentlemen:

There is enclosed herewith one copy of the new agreement covering the 23rd Street Stores as to which there are two features to which I wish to call your attention and would like your acceptance.

ALLOWANCES AT DELAWARE AVENUE & MORO PHILLIPPS STORES

Nothing is said therein respecting the loading and unloading allowances at your Delaware Avenue and Moro Phillips Stores for the reason that as the 23rd Street situation involved a capital investment any contract relating thereto should be made separate and distinct from anything else.

You may, however, accept this letter as an agreement on the part of The Baltimore & Ohio to make you an allowance of 50 cents per ton for loading and unloading carload freight at your Delaware Avenue and Moro Phillips Stores, so long as those stores are operated by the Pennsylvania Warehousing & Safe Deposit Company, when such freight has had or is to receive a road haul movement over the Baltimore & Ohio Railroad, and so

long as any allowance is made by either the Pennsylvania or the Philadelphia & Reading Railroad Company to the Pennsylvania Warehousing & Safe Deposit Company or to any other warehouse company or companies in Philadelphia, unless sooner estopped from making such allowance by a decision or order of the Interstate Commerce Commission, The Public Service Commission of Pennsylvania, Court of Competent Jurisdiction or by law.

Further in executing and delivering the agreement enclosed, we do so with the understanding that the language of its third paragraph, i. e., "so long as any other railroad in Philadelphia in competition with the Baltimore and Ohio, etc. . . . . shall be taken to mean and include the Pennsylvania and Philadelphia & Reading Railroads only, and I will be glad if you will confirm this interpretation and your agreement to these two matters which will thus obviate the necessity of the agreements' reexecution. Copies of this letter and your reply can then be attached to and filed with the original agreement.

Yours very truly

Archibald Fries.

PENNSYLVANIA WAREHOUSING AND SAFE DEPOSIT CO.

Executive Offices: 113-115 South Third Street, Philadelphia
Office of Vice-President and General Superintendent

August 3, 1926

Mr. Archibald Fries, Vice-President
in charge of traffic,
Baltimore & Ohio Railroad Co.,
Baltimore, Md.

Dear Mr. Fries:

We accept the provisions of your letter of August 2, 1926 supplementary to and a part of the Agreement between the Baltimore & Ohio Railroad and the Pennsylvania Warehousing & Safe Deposit Company of even date herewith, and understand that the same has the full force and effect as though the same were duly incorporated in the said agreement.

Assuring you of our earnest desire to cooperate with your company in the satisfactory business arrangement subsisting between us, and with kindest regards, believe me to be

Very truly yours,

Ralph Earle,
Vice-President.

(The three letters which had previously been identified as Plaintiff's Exhibit No. 21 were here offered in evidence. They read as follows:

January 27, 1922.

Mr. E. D. Hilleary, Frt. Traffic Mgr.,
Phila. & Reading Ry. Co.,
Reading Terminal,
Philadelphia, Penna.

My dear Mr. Hilleary:

I have already made it plain to you that in these times, so trying to all of us, I have only desired that your Company may carry out the provisions of our basic leases, which have only been varied from time to time, and not intended to be so permanently, in relief of temporary exigencies of your own company.

The case of roll paper which has been the most conspicuous instance, there having been a reduction made in terminal charges from 30¢ to 15¢ per ton. I have already shown in figures that which I believe justify a return to the primary basic rate of 30¢ a ton.

I hope you will agree with me that this is really a serious handicap to both of us, in view of the fact that the Company, rendering a similar service to the Pennsylvania, is being fortified in its effort to take trade from us, and you, by a 50¢ rate, against the present but 15¢ that we have been collecting.

Until recently I think our company has appreciated more fully than yours, what would be the effect upon the interests of both, by a more active spirit of mutual cooperation. For this reason, we have increased, by personal solicitation and by the hardest kind of work among our allied interests,

the tonnage of the Railroad Company. Having this in mind, I do not wish to make demands upon the Railroad Company except where it is absolutely necessary to protect the business of both. I am therefore going to ask you, whether your company would not be willing, until things get better, to allow us an additional terminal of 7½¢ per ton on roll paper, thus making it 22½¢ per ton instead of the present 15¢, which has really been of late quite burdensome; and then, later, when business so changes that it may not be burdensome to you, to restore the basic rate from which we started.

I am taking the liberty of enclosing a copy of letter written under date of February 3rd, 1908, by our then Treasurer, Mr. M. E. Levering, to your Mr. B. H. Bail.

I also wish to take this occasion to thank you for the many helpful suggestions which you have made to the writer, who, as you know, is only an apprentice in the traffic school and who cordially appreciates your assistance.

With kind regards, I am

Yours very truly,

Vice-President.

PENNSYLVANIA WAREHOUSING AND SAFE DEPOSIT CO.

Banking House: Nos. 113 and 115 South Third St.

Philadelphia, Feb. 3rd, 1908.

Mr. B. H. Bail,
General Freight Agent,
Phila. & Reading Railroad Co.;
Terminal St., Phila.

Dear Sir:

I beg to acknowledge receipt of your favor of Jan. 31st ult. The proposed terminal allowance of 15¢ per ton, instead of 30¢ per ton on shipments of printing paper in rolls for unloading, storage, etc., will be insufficient to pay us for the actual cost incurred in such service. We will, however, agree to receive this merchandise under the new rate of payment proposed. Of course no other article or condition in the agreement executed December 12th, 1901 alluded to in your letter, is to be affected by this revision. If, after six months trial of the new rate and conditions we shall desire to have the matter reconsidered, we understand that you will be able to take this question up with us for possible revision.

Yours very truly,
Treasurer.

March 7th, 1922.

Mr. E. D. Hilleary, Frt. Traffic Mgr.,
Philadelphia & Reading Railway Company,
Reading Terminal,
Philadelphia, Pa.

Dear Sir:

In reply to your request, I am sending you:—

1st. The net earnings, as shown by our books, for the six months ending December 31st, 1921. In

this connection, you will please note that we have to lose the interest on the large amounts we pay on freight charges which we advanced to the Philadelphia & Reading Railway Company.

2nd. Most of the papers have or require places where they can store a certain amount of paper, which we, as you know, have to handle without any additional charge. For example, in the past the largest amount of rolls which we had to deliver was approximately 100, but I estimate our present average at from 300 to 350 rolls a day, which going out in the free time causes a large expenditure, for which we are not reimbursed; we having the additional burden of paying for the insurance, which is a serious matter.

3rd. The Sixteenth Street stores have ceased to be modern warehouses, upon which we might get a rate approximating 5¢, while the insurance rate at Sixteenth Street runs as high as 59¢. This has burdened us very seriously, as the rate is prohibitive against other warehouses.

4th. Our rent and taxes in 1916 were, as I remember, $21,262.08, but in the face of these other handicaps, they have been increased to $26,067.00.

5th. Our labor average before the War was about 18 1/3¢ per hour, while now it averages approximately twice as much.

6th. As the Merchants' Warehouse Company has been handling cores for our customers at $1.00 a ton, the Pennsylvania Railroad has been receiving the benefit of these shipments. It has, therefore, become necessary, to keep our customers satisfied and retain the business, for us to handle cores for but two Mills, and this expense will probably be increased at any time.

In the face of all this, we have to compete with a competitor that was receiving on my last information, 50¢ both in and out, or a charge of $1.00 in such cases, whereas we are receiving but 15¢ on the handling of paper, depriving us of all flexibility or power to meet situations in competition with them, and, in our judgment, almost fatally handicapping both the Reading and ourselves in getting and retaining business. We have a very large capital involved, and have had to depend upon it largely to enable us to continue at all under present conditions, with great responsibilities and risks that may meet us at any time.

In addition to all this—and we would like a comparison made—we have steadily and without complaint until this matter has been brought up, been expending great effort and using all our powers to increase the business of the Reading Railroad. It is, therefore, our strong hope that the present situation will appeal to both the judgment and fairness of your Company.

Would it be asking too much for you to give this your promptest consideration, in order that we may not be so handicapped in the battle for our common benefit.

Yours very truly,

Vice President.)

EVIDENCE ON BEHALF OF PLAINTIFF IN REBUTTAL.

Testimony of GEORGE M. RICHARDSON, recalled for further cross-examination by the plaintiff, Terminal Warehouse Company.

CROSS-EXAMINATION.

Some of the accounts which I testified had been lost by the Merchants Warehouse Company to the Terminal Warehouse Company were lost as follows: The Fairbanks-Morse Company account in 1932; the J. B. Ford Sales Company account in 1931 or 1932; and the Richard Boynton account in 1930 or 1931, probably 1931. The Merchants Warehouse Company also lost the Quaker City Wholesale Grocery account, probably the best account we ever had, to the new property of the Terminal Warehouse Company at Twenty-first and Hamilton. My understanding is that the rate which the Terminal Warehouse Company accepted was twenty cents lower than our rate.

Q. You testified Wednesday as follows: "Q. Then you mean to say, do you, that whenever a car of any kind comes into your warehouse and is unloaded, and is by you delivered to the tailboard of a truck, it goes to one person? A. That is my answer; yes, sir. Q. That is what you say? A. Yes, sir. Q. And it is never distributed to different customers of your warehouse in Philadelphia? A. I won't say that; we deliver it to him; I don't know what he does with it."

Q. Is that correct?

A. That's my recollection; yes, sir.

Q. Now, I want to ask you if you did not in the proceeding before the Interstate Commerce Commission submit three exhibits, which you said were typical and showing in detail how you handled your business in that connection?

A. That's correct; yes, sir.

Q. I want you to look at them. They are photostatic copies of these bills and orders and all that sort of thing, setting forth in detail, Exhibits 90, 91 and 92, and see if those are not the exhibits you, yourself prepared and offered in Washington.

A. I remember this exhibit (indicating).

Q. Will you look at this (indicating), which relates to a car consigned to the A. E. Turner Company in your care?

A. Yes, sir.

Q. What is that first paper that you have before you there?

A. We call it an arrival notice or a non-negotiable receipt.

Q. To whom did you send that?

A. Our company mailed that to Turner.

Q. You sent that to Turner. What does it say?

A. It states that we have received and stored for the account of the A. E. Turner Company; without reading all the detail?

Q. Yes; without reading all the detail.

A. A carload of canned beets, designating the number of cases of each brand, and also showing the marks, such as Kerr and Company, A. Salus & Sons; J. H. Gibson, the Flanagan Company, Githans Rexsamer, A. E. Lowry & Brother, A. E. Turner Company, Bellmore Stores Company, Thomas Fealy, also a notice saying that two packages or cases of No. 10 sliced beets were unloaded in transit in damaged condition; swelled and leaking.

Q. Now, that notice that you sent to the Turner Company for that car was to be sent to how many people?

A. It shows that the entire car was delivered to A. E. Turner Company, consignee, the party designated on the bill of lading.

Q. And that notice designates, does it not, that it is to go to eight or ten different persons and the amount for each one?

A. No, sir; it shows, as I stated, it goes to A. E. Turner Company, to the party to whom that bill of lading says it should be delivered and no one else. That is the practice and that is the billing.

Q. Will you take the next set of papers. What are they?

A. That is Mr. Turner's order.

Q. How many are there of them?

A. I made a mistake. Eight orders from Turner.

Q. To do what?

A. To make delivery.

Q. To eight different people; is that right?

A. I checked seven orders here (indicating).

Q. Very well, there are seven, to be delivered to seven different persons.

A. Well, this is Turner's order for delivery to the team of whoever presented this order.

Q. That is right, and they are different persons or companies?

A. Wait. That's a delivery to Turner and not to anyone else.

Q. Read one of them.

A. Deliver to Githans Rexsamer or order, designating the number of cases, and signed Turner.

Q. Did you make that delivery to that firm?

A. Yes, sir.

Q. And here is the receipt (indicating), right there, showing that you did do it?

A. Yes, sir.

Q. And the same thing is true of the other six or seven?

A. Yes, sir.

Q. What is the notice at the bottom about deliveries being on free time and so forth?

A. At the bottom is an insurance clause. Is that the one you refer to?

Q. No; I don't mean that. What does it say about free time on there.

A. There is a statement here to the effect that the merchandise designated below is now at our warehouse, subject to your order, on payment of the freight and charges due thereon and surrender of the bill of lading, properly endorsed when required. It was not required in this instance, because it is a straight bill of lading. This company not responsible for damage by fire, heating, leakage, moths, vermin, providential causes or any other damages not due to this company's negligence.

Q. I guess I will have to point out what I want you to look at. After you made these deliveries, you were through with this car, weren't you?

A. That record indicates that part of the shipment remained in store.

Q. For example, on the order, which you did submit in evidence in Washington, which said deliver to the Almar Stores Company a certain number of boxes of merchandise, there is the notation "Free Storage." Is that right; "storage"?

A. That's what it is intended for.

Q. Expires 5 P. M., 2d of May——

A. It looks like 5/25/28.

Q. 5/25/28. Is that the usual notation put there when the time expires?

A. We didn't make that notation. That's Turner's orders.

Q. For all that?

A. Yes, sir.

Q. And the same thing is true on those other notices?

A. That is Turner's notice to his customer.

Q. Did they all go out at the same time—that same car?

A. I can't tell.

Q. Can't you tell by looking at these deliveries (indicating)?

A. There is a notation on the back of the Turner orders indicating that the delivery had been accomplished within the free time, if I read this notice correctly.

Q. Now, then, take the second exhibit, No. 91, that relates to a car shipped from whom?

A. Apparently this billing covers a carload of 1000 cases of candied beets, originating—it looks like the Illinois Canning Company, Hoopeston, Illinois.

Q. I do not want the details, because we want to conclude the matter, but in brief this exhibit is substantially similar to the one you have already identified, and shows that these canned goods were distributed, I think, to ten different people on orders from the consignee, the Jessup and Roberts Company.

A. It appears that we made delivery, ten deliveries to the consignees, Jessup and Roberts.

Q. You think you made the deliveries to the Jessup and Roberts Company?

A. Yes, sir.

Q. Now, Mr. Richardson, don't tell us that. You made ten different deliveries to ten different people on the order of the Jessup and Roberts Company?

A. I see no such construction, at least in the instructions on the paper. We were bound to deliver to the order of the consignee.

By THE COURT:

Q. You know what you did in actual fact?

A. Your Honor, I can't tell whether Jessup and Roberts sent teams to load these goods at the warehouse or whether their customers sent the teams. I couldn't state.

Q. You would know, would you not?

A. I, personally, wouldn't know, your Honor.

Q. Are you prepared to say that you did not make the actual delivery to these people on the order of the consignee company?

A. No; I wouldn't say that.

By Mr. White:

Q. These receipts and orders—you signed the receipt saying they should get the merchandise?

A. We don't have that receipt here. This is simply the order (indicating).

Q. Isn't there something in the book indicating by whom it was received?

A. No, sir; that simply indicates that we have made a delivery on a date, and the number you see marked here with a machine is the number of our receipt, which we held. The receipts are not here.

Mr. White: I offer these three exhibits, which the witness has testified as having offered before the Interstate Commerce Commission. I think they will explain his method of conducting the business.

By Mr. White:

Q. You said in your testimony that these were three typical cases?

A. That's true.

(The three exhibits which had been identified by the witness as having been offered before the Interstate Commerce Commission, were now offered in evidence as physical exhibits, as Plaintiff's Exhibit No. 22.)

Mr. Barnes: May it please your Honor, I am going to make a motion to strike off certain testimony. On page 50 of the record upon the evidence submitted by witness Rissinger, there was offered in evidence a certain compilation by him, showing the amounts paid to the Merchants Warehouse Company, which, after some discussion, your Honor said would be disposed of at

the next session of the Court. On the following day the objections were renewed at page 55 of the testimony, and on pages 56 and 56a, your Honor sustained the objection to that testimony. Mr. Rissinger, being recalled, referred to the statements he had prepared, and on page 183 was asked to state the amount of the payments referred to as having been made to the Merchants Warehouse Company, and thereupon, on page 183, his testimony as to the amount was admitted.

The position of the defendants, in making the motion, is that there was no other matter disclosed in his testimony to warrant the admission of that statement, under the objections of the defendants.

Likewise, on page 160 of the record, Mr. Sullivan testified with reference to certain schedules and exhibits, which he submitted, and was permitted to testify, on that page, to the amount of revenue received by the Terminal Warehouse for certain services rendered by it, and on page 162, the revenue which they might have received upon the basis stated on that page and in that discussion.

Both defendants move to strike out the testimony on the pages last mentioned, given by Mr. Sullivan.

THE COURT: I understand, Mr. Barnes, that that is not in the form of a motion to strike out, but substantially a renewal of the objection that you made; is that right?

MR. BARNES: It is as to the latter, exactly. As to the former, it is to call your Honor's attention to the memorandum that you gave excluding the testimony when first offered, and that subsequently nothing was offered to warrant the admission of it, in view of the memorandum which you have filed in the first instance.

THE COURT: The motion to strike out is denied and an exception allowed the defendants.

(Adjourned to Monday, March 26, 1934, at 10 o'clock A. M.)

Plaintiff's Exhibits.

PLAINTIFF'S EXHIBIT NO. 1.

(By agreement of counsel, the several agreements between The Pennsylvania Railroad Company or one of its subsidiaries and the Merchants Warehouse Company, respectively dated July 1, 1926 (four contracts), January 25, 1917, July 3, 1918, April 10, 1922, March 4, 1925, and July 28, 1917 are not to be printed as part of this bill of exceptions, because all of said agreements were by stipulation of counsel of April 25, 1932 attached to the plaintiff's statement of claim as exhibits and are to be printed in the record as part of said statement of claim. They are hereby incorporated by reference and are to be considered as if reprinted in full in the Bill of Exceptions)

PLAINTIFF'S EXHIBIT NO. 2.

(By agreement of counsel, the following excerpts from a certified copy of Pennsylvania Railroad Company's Tariff G. O. I. C. C. No. 14400 and its supplements, which were offered as Plaintiff's Exhibit No. 2, are printed in this bill of exceptions. It is further agreed that the following provisions were in force from January 19, 1926 to May 22, 1931.)

"LOCAL FREIGHT TARIFF

of

ALLOWANCES

for

VARIOUS SERVICES

AT PHILADELPHIA, PA:

When freight is handled through the warehouses shown below, allowances will be made on

inbound and outbound freight by the Railroad Company to these companies for services performed, as follows: MERCHANTS' WAREHOUSE COMPANY—Delaware Avenue, Water, Chestnut and Walnut Streets, Philadelphia, Pa.

On flour in barrels, 50,000 barrels or less, handled in one month ....3½¢ per barrel
On flour in barrels, over 50,000 barrels, handled in one month ....2½¢ per barrel
On flour, other than in barrels, and all other merchandise .....50¢ per 2000 pounds

No payment will be made on inbound or outbound traffic milled, mixed, malted or stored, in transit under the provisions of tariffs lawfully on file with the Interstate Commerce Commission and The Public Service Commission of the Commonwealth of Pennsylvania, nor on any traffic consigned to or by the warehouse company."

(It is stipulated and agreed by counsel that similar provisions in the Tariff apply at all other warehouses of Merchants Warehouse Company in Philadelphia except that at the warehouses at Front and Bainbridge Streets and at Bainbridge, Front, Kenilworth and Penn Streets the allowance was only 35¢ per ton instead of 50¢. By Supplement 14 filed May 22, 1931, effective June 23, 1931, the allowances to the Merchants Warehouse Company were cancelled and discontinued—in conformity with order of the Interstate Commerce Commission Docket 20968 of December 28, 1929.)

PLAINTIFF'S EXHIBIT NO. 6.

(By agreement of counsel, it is stipulated that Plaintiff's Exhibit No. 6, Vol. VIII, No. 8 of the magazine called "Commerce and Industry" (issue of May 1928) contains a full page advertisement identical with that reproduced as Plaintiff's Exhibit No. 5—said latter advertisement appearing in the January 1928 issue of said magazine, i. e., Vol. VIII, No. 4.)

PLAINTIFF'S EXHIBITS NOS. 7, 8 AND 9.

(By agreement of counsel, Plaintiff's Exhibits Nos. 7, 8 and 9, consisting of certain letters between the Merchants Warehouse Company and customers, are not reprinted here because the same are printed in full in the narrative transcript of the testimony. (Pages 158 to 163 of Record.)

PLAINTIFF'S EXHIBITS NOS. 15, 16 AND 17.

(By agreement of counsel, Plaintiff's Exhibits Nos. 15, 16 and 17, consisting of certain letters between the Terminal Warehouse Company and customers, are not reprinted here because the same are printed in full in the narrative transcript of the testimony. (Pages 191 to 195 of Record.)

PLAINTIFF'S EXHIBITS NOS. 19 AND 20.

(By agreement of counsel, it is stipulated that Plaintiff's Exhibits Nos. 19 and 20, which are not susceptible to ready reproduction in a printed record, because of their bulk and nature, are not to be printed in the record but are to be presented to the Appellate Court for its consideration as physical exhibits; and are to be considered a part of and as if included in the bill of exceptions.)

PLAINTIFF'S EXHIBIT NO. 21.

(By agreement of counsel, Plaintiff's Exhibit No. 21, consisting of certain correspondence between the Pennsylvania Warehousing and Safe Deposit Company and Philadelphia and Reading Railroad, are not reprinted here because the same are printed in full in the narrative transcript of the testimony.) (Pages 395 to 399 of Record.)

Defendants Exhibits.

DEFENDANTS' EXHIBIT NO. 1.

(By agreement of counsel, the several agreements between the Pennsylvania Railroad Company or one of its subsidiaries and the Merchants Warehouse Company antedating the several agreements between said parties offered as Plaintiff's Exhibit No. 1 and respectively dated July 15, 1886, November 2, 1886, June 27, 1894, November 1, 1894, April 1, 1901, May 7, 1904, and November 1, 1904, are not to be printed as part of this bill of exceptions, since said earlier agreements are similar to the later existing agreements between the parties; and the agreement of July 15, 1886, is printed as a part of this bill of exceptions as a typical example of said agreements.)

AGREEMENT OF JULY 15, 1886.

(Stamped on margin): EXPIRED.

THIS AGREEMENT, made this fifteenth day of July 1886, betweeen the PENNSYLVANIA RAILROAD COMPANY, hereinafter called the Railroad Company, party of the first part, and the MERCHANTS' WAREHOUSE COMPANY OF PHILADELPHIA, hereinafter called the Warehouse Company, party of the second part, WITNESSETH:

FIRST.—That the Railroad Company agrees to have erected upon the property situate on the north side of Market street, in the Ninth Ward in the city of Philadelphia, beginning at a point sixty-four (64) feet east of the east side of Eighteenth street, containing in front on Market street eighty-four (84) feet, extending northwardly between parallel lines one hundred and eighty (180) feet to Jones street, the value of which is

hereby fixed at seventy-five thousand dollars ($75,000), a suitable building for warehouse and storage purposes, at an estimated cost of eighty-five thousand dollars ($85,000), upon plans and specifications to be approved by the parties hereto.

SECOND.—The said Railroad Company further agrees to have the said building erected and completed in three months from and after the date of the execution of this agreement, or as soon thereafter as practicable, and upon the completion of the same agrees that the said property shall be leased to the said Warehouse Company at a rental of five per centum per annum from said time of completion upon the value of the same, as aforesaid, payable quarterly, and in addition thereto all taxes and water-rents to be paid by the lessee.

THIRD.—That the said Railroad Company also agrees to construct or cause to be constructed to and across Jones street the necessary sidings and track facilities to connect its railroad with the said warehouse, and that it will thereafter do the necessary shifting, in order to enable its cars to reach the warehouse aforesaid for the purpose of taking from and delivering to the same all freight shipped therefrom, or destined thereto, and shall and will take and deliver the same over its lines at the same rates, in the same manner, and with the same promptness that it delivers and receives traffic at any other terminal point controlled by it in the city of Philadelphia.

FOURTH.—The said Railroad Company shall pay to said Warehouse Company twenty (20) cents per ton for each ton of merchandise delivered by the said Railroad Company to said Warehouse Company or received by the said Railroad Company from said Warehouse Company as aforesaid. In addition to such amount so

to be paid by the Railroad Company, the Warehouse Company shall have the right to charge the public, consignee, shipper, or owner on any merchandise that it may store or handle, or for any services rendered, or facilities furnished, reasonable and customary rates for the services performed; but the charges to be made to the public for services rendered by the said Warehouse Company shall be subject to the approval of the Railroad Company.

FIFTH.—The Warehouse Company agrees upon completion of the said building to take a lease and doth hereby take a lease of the said property at the rental and upon the terms aforesaid until July 1st, 1891. Said company also agrees that it will keep the said demised premises in good order and repair, and at the end of the said term, or other sooner determination of said lease, will peaceably deliver up possession of the said premises in like good order and condition, ordinary wear and tear and casualties by fire and unavoidable accidents only excepted. That it will not commit or suffer to be committed any act or thing whereby or in consequence whereof the conditions or stipulations of the policy or policies of insurance on the said premises shall become avoided or suspended: AND PROVIDED, That no rental shall be charged or paid for the said demised premises in the event of their destruction by fire until said premises are again in condition for use.

SIXTH.—That it will use all reasonable efforts to secure to the lines owned, leased, controlled, and operated by the Pennsylvania Railroad Company, all traffic controlled by said Warehouse Company, or destined to or from the warehouse aforesaid, and that traffic passing over said lines shall at all times have the preference in the use of the facilities furnished by the said Warehouse Company over traffic passing over other lines, and that without the consent of the Railroad Company,

the said facilities shall not be extended to traffic passing over other lines. In consideration of the payment of twenty cents per ton as hereinbefore set forth, the Warehouse Company also agrees to furnish, at its own cost, all manual labor that may be required to promptly load and unload the cars of the Railroad Company at the warehouse aforesaid, and to handle promptly and effectively all traffic delivered to it by the said Railroad Company, and to pay all running expenses of said warehouse.

SEVENTH.—The said Warehouse Company also agrees to act as the agent of the said Railroad Company for the collection of freight and charges upon all such traffic as may be transported to and delivered at said warehouse as aforesaid, such delivery at said warehouse not being intended as a relinquishment of possession of such traffic, or of the lien for freight or charges thereon by the Railroad Company, but such possession is to be held by the Warehouse Company acting as agent, for the enforcement of such lien, and of other rights of the Railroad Company. The said Warehouse Company agrees to perform the general duties incident to such an agency, and to enter into bond, with good and sufficient sureties, to be approved by the said Railroad Company, for the faithful performance of its duties as such agent; such bond to be of the usual and customary form given by other agents of the said Railroad Company.

EIGHTH.—It is further agreed that no assignment of this contract shall be valid without the consent of the Pennsylvania Railroad Company, and that this shall apply as well to involuntary assignments, and that upon the happening of any legal proceedings the effect of which shall be to divest the title or possession of the said Warehouse Company, this contract shall at the

option of the said Pennsylvania Railroad Company cease and determine.

NINTH.—This contract shall continue until the first day of July, 1891: *Provided always,* That if the lessee shall fail to pay the rents or sums hereby reserved, on the days and times when the same are payable, or shall in any other respect violate or fail to comply with any of the conditions and covenants herein contained, then this contract and the terms hereby created shall, at the option of the Pennsylvania Railroad Company, on thirty days' notice, determine and become absolutely void.

IN WITNESS WHEREOF, The parties hereto have hereunto affixed their corporate seals, duly attested, the day and year first above written.

THE PENNSYLVANIA RAILROAD COMPANY,

By

G. B. ROBERTS (Seal)
President.

Attest:

JNO. C. SIMS JR.
Secretary.

MERCHANTS' WAREHOUSE COMPANY,

By

JAMES HAY (Seal)
President.

Attest:

HUGH B. ELY
Secretary.

DEFENDANTS' EXHIBIT NO. 3.

Memorandum of agreement entered into this 10th day of April, A. D. 1897, by and between The Pennsylvania Warehousing & Safe Deposit Company, a corporation organized under the laws of the Commonwealth of Pennsylvania, hereinafter called "Warehouse Company", party of the first part, The Tradesman's Grain Elevator & Storage Company, a corporation organized under the laws of said commonwealth, hereinafter called "Elevator Company", party of the second part, and The Baltimore & Ohio Railroad Company, a corporation organized under the laws of the State of Maryland, and John K. Cowen and Oscar G. Murray, Receivers of the said Baltimore & Ohio Railroad Company, duly appointed under the decree of the United States Circuit Court of the Fourth Circuit at Baltimore, Maryland, on the 29th day of February, 1896, together with The Baltimore & Philadelphia Railroad Company, a corporation organized under the laws of the States of Delaware and Pennsylvania, and duly merged into one corporation, under the laws of merger of said States, for themselves and as lessees of the Schuylkill River East Side Railroad Company, and The Schuylkill River East Side Railroad Company, a corporation organized under the laws of the Commonwealth of Pennsylvania, hereinafter called "Railroad Companies", parties of the third part.

Description of Elevator Co.'s Property.

Whereas, The said Elevator Company is the owner of a certain lot or piece of ground with the buildings and improvements thereon erected, located in the City of Philadelphia, and situate on the west side of Twenty-third street (fol. 989) at the distance of 143 feet 4 inches northward from the north side of Race street in the City of Philadelphia. Containing in front or

breadth on the said Twenty-third street 75 feet, and extending of that width westward in length or depth about 215 feet to a certain 40 feet wide street called St. David street, bounded northward by ground formerly of Harry K. Cummings, and now of the said Elevator Company, being the premises next described, eastward by the said Twenty-third street, southward by ground formerly of Samuel Smyth, and westward by St. David street aforesaid.

And all that certain lot or piece of ground with the brick buildings thereon erected, situate on the west side of Twenty-third street at the distance of 218 feet 4 inches northward from the north side of Race street in the Tenth ward of the City of Philadelphia aforesaid. Containing in front or breadth on said Twenty-third street 75 feet, and extending of that width westward in length or depth 215 feet more or less to St. David street, bounded northward by ground formerly of Mary Cuthbert, eastward by said Twenty-third street, southward by the first described lot, and westward by St. David street, the said two lots being subject to the lien of a certain mortgage debt, the principal whereof amounts to the sum of fifty thousand dollars ($50,000).

Sale of Property to Warehouse Co.—Construction of Warehouse and Other Improvements.

And whereas, at the request of the said Railroad Companies, parties of the third part, the said Elevator Company, party of the second part, has agreed to sell the said lots of ground with the buildings now thereon erected, and appurtenances to the said Warehouse Company, party of the first part, for the price or sum of seventy thousand dollars ($70,000) subject to the said mortgage debt of fifty thousand dollars ($50,000) aforesaid, and at the instance and request of the said Railroad Companies, parties of the third part, the said Warehouse Company, party of the first part, has

agreed to purchase the same for the price above mentioned, and erect thereon or upon the northernmost lot thereof a new warehouse with modern improvements, for the rapid and economical handling and storage of railroad (fol. 990) freights, of a size and capacity as shown by the drawings and specifications thereof agreed to by the parties as evidenced by the signatures of the President of the said Warehouse Company, and the Receivers of said Baltimore & Ohio Railroad Company, and on file in their respective offices at a cost not to exceed the sum of ninety thousand dollars ($90,000).

And whereas, for the mutual advantage of the parties hereto, the said Railroad Companies, in consideration of the premises, and of the free storage, for a period of ten days, of freight and goods and merchandise delivered by said Railroad Companies to the present Warehouse, and to the same as enlarged as herein provided, and the free handling of the same by the said Warehouse Company, with free insurance of said freight and goods and merchandise so delivered for said period, are ready to engage to pay to the said Warehouse Company a terminal charge of 35 cents per ton upon all freight received from said Railroads over their track connections with said Warehouses not including freight switched from other railroads within the limits of the City of Philadelphia, and to stipulate that the same shall not in any one year, during the existence of this contract, fall below a minimum of 70,000 tons.

Now this agreement witnesseth:

Purchase of Property by Warehouse Co., Cost of

First. That the Warehouse Company, party of the first part, for and in consideration of the sum of One Dollar to it in hand paid, the receipt whereof is hereby acknowledged, agrees to purchase from the Ele-

vator Company, party of the second part, the premises first hereinabove described together with all of the appurtenances, for the price or sum of seventy thousand dollars ($70,000) subject to the lien of a mortgage debt, the principal of which is the sum of fifty thousand dollars ($50,000) payment of which is assumed by the Warehouse Company, and the Elevator Company, party of the second part, agrees to sell and convey to the said Warehouse Company, party of the first part, the premises (fol. 991) named, for the price hereinbefore mentioned and stipulated, subject only to the lien of the mortgage aforesaid.

Construction of Warehouse and Other Improvements, Cost of

Second. For and in consideration of the sum of One Dollar ($1.00) and the premises the Warehouse Company, party of the first part, hereby covenants and agrees with the Railroad Companies, parties of the third part, that upon the conveyance to it of the said premises, and the vesting of title in it, to the same, by the said Elevator Company, the party of the second part, that it, the Warehouse Company, party of the first part, will forthwith proceed to erect upon the northernmost lot of said premises described, a Storage Warehouse of a size and capacity as shown by the drawings and specifications thereof agreed to by the parties as evidenced by the signatures of the Presidents of the said Warehouse Company, and of the said Baltimore and Ohio Railroad Company, and on file in their respective offices. The amount to be expended upon the same is estimated not to exceed ninety thousand dollars ($90,000) the Warehouse Company being at liberty to construct the same for a less amount, provided the same can be done without sacrificing the storage capacity of the building, or the strength efficiency and of the structure and its ma-

chinery, or departure from the plans and specifications above mentioned. A proper item of said cost it is agreed shall be interest at 6% per annum upon such monies as may from time to time be paid out by Warehouse Company on account of construction of said warehouse and calculated to the date of completion.

Track Connections—Freight to be Stored, Minimum Amount Yearly—Warehouse Co. Appointed Agent of R. R. Co.

Third. In further consideration of the mutual benefits and advantages to accrue from the operation of said Warehouse, it is covenanted and agreed between the Warehouse Company, party of the first part, and the Railroad Companies, parties of the third part, as follows: Each of the said parties covenanting as well for itself as for its respective successors, the Railroad Companies, parties of the third part, covenant and agree that the track connections (fol. 992) already existing across St. David street into the property aforesaid, connecting the said property with the Railway of the Schuylkill River East Side Railroad Company shall remain and be maintained during the term of this agreement, and that the Railroad Companies will deliver to the Warehouse Company during said term for storage and warehousing (but only so far as under existing contracts, they may be able so to do), all local flour and general merchandise, which can be controlled by them, and destined for any points in Philadelphia, west of Broad street, to the extent of not less than 70,000 tons per annum, and the said Railroad Companies, parties of the third part, agree to constitute and appoint said Warehouse Company, party of the first part, their agent for all freight delivered to said Warehouse Company, by said Railroad Companies, the agency thus to be created being understood by both parties hereto to extend merely to

the delivery of consignments from said Railroad Companies, and the collection of freight charges due to said Railroad Companies thereon, and it is not to be construed so as to relieve the Warehouse Company from any responsibility for any claims for loss or damage which may arise by reason of the acts or omissions of said Warehouse Company.

Terminal Allowance, Minimum Amount Yearly—Payable Monthly—Free Period.

Fourth. The Railroad Companies further agree to pay to said Warehouse Company, as a terminal allowance for the facilities to be afforded (that is to say for the receiving and handling and ten days' storage and insurance, of the consignments delivered to said Warehouse Company) the sum of 35 cents per net ton of 2,000 pounds, for each and every ton of freight received, handled and stored by said Warehouse Company, and delivered to it by said Railroad Companies, until the total of the sums so paid in each year of the operation of this agreement shall aggregate the amount of twenty-four thousand five hundred dollars ($24,500.) and to make payments of said amounts per ton monthly, on or before the 15th day of each month, for the operations of the preceding month, it being understood and agreed that the total sum to be paid by the Railroad Companies (fol. 993) to the Warehouse Company under this agreement, shall not in any event be less than twenty-four thousand five hundred dollars ($24,500) per year, it being the true intent and meaning of this agreement, and so understood by all parties hereto, that the Warehouse Company shall be assured of sufficient tonnage at the rate aforesaid, to produce for it at least the amount of twenty-four thousand five hundred dollars ($24,500) per year, and that after said revenue has been produced, the Warehouse Company shall and will receive,

handle and store all freight and goods and general merchandise delivered to it by the Railroad Companies, for said storage period of ten days, with insurance, free of charge, to said Railroad Companies for such service, excepting only the actual expense to the Warehouse Company, such as labor, etc., of receiving and handling and storing the same. It is also understood and agreed that the said stipulated sum of 35 cents per ton shall not be payable upon any tonnage that is merely switched over the Schuylkill River East Side Railroad from its connection with the Philadelphia & Reading Railway, or from other lines; with the option, however, to the Warehouse Company, to refuse or to take such freight upon the written consent or request of the said Railroad Companies, parties of the third part.

Repair and Maintenance of Tracks—Delivery of Car—Maintenance of Warehouse and Improvements —Cars Unloaded Free.

Fifth. The Railroad Companies covenant and agree that they shall and will provide and keep in repair the two railroad tracks now crossing St. David street to the western end of the Warehouse property, with suitable connections with the railroad of the Schuylkill River East Side Railroad Company, as may be required for the prompt and convenient transfer of cars to and from said Warehouse and Railroad, and shall and will, with all reasonable dispatch, deliver all cars arriving at and destined for the said Warehouse, which said Warehouse shall receive and accommodate; and the Railroad Companies shall promptly remove from the same all cars when unloaded, or reloaded with return freights. The Warehouse Company covenants and (fol. 994) agrees to keep up and maintain at its own expense the said Warehouse and its appurtenances in good condition,

repair and working order, rebuilding and restoring the same whenever it may become necessary so to do, and to maintain at all times sufficient labor and appliances to promptly and expeditiously handle, store and receive and deliver all such merchandise and freight to the full capacity of said Warehouse in the manner as contemplated by this agreement, and to unload all cars, free of expense to the Railroad Company, except as provided in the last preceeding covenant, viz: when the total amount of traffic received from said Railroad Companies shall have exceeded 70,000 net tons.

Payment of Freight Charges—Insurance on Freight.

Sixth. The Warehouse Company covenants and agrees to pay the said Railroad Companies, within 10 days after said freights are delivered by them to said Warehouse Company, all charges due upon said freights and which have accrued up to the time of such delivery, it being understood and agreed that for the amount of said charges so paid, and until the same are collected from the actual consignees or owners of said freight, on delivery of the same to it, said Warehouse Company shall be entitled to the benefits of the carrier's lien, on said freights, as possessed by the said Railroad Companies, and shall have the right and privilege of collecting the same, in the name of said Railroad Companies, to the use of the Warehouse Company, and the said Warehouse Company further covenants and agrees to keep up a floating policy of insurance sufficient to cover all property delivered to said Warehouse Company by Railroad Companies, so as to meet all claims for losses or damage to consignments while the same are in the custody of the Warehouse Company, during said period of 10 days, and to apply the insurance money so received to the payment of said claims, if any.

Insurance on Building—Rebuilding in Case of Fire—Storage Facilities While Rebuilding.

Seventh. And the said Warehouse Company further agrees to keep the building and its appliances sufficiently insured from loss by fire so that the same may be promptly (fol. 995) rebuilt in case of partial or total destruction, to the original standard of structure and appliances, which obtained at the time of such partial or total destruction. And in case of the total or partial destruction of said Warehouse by fire or otherwise, then the said Warehouse Company, party of the first part, during the period of time required for the rebuilding in whole or in part of said Warehouse shall provide for the use and accommodation of the Railroad Companies, parties of the third part, warehouse facilities at such warehouses as it may from time to time have on south Delaware avenue, between Lombard and South Streets, to the extent to which the same may be available, for the free storage and insurance of freights, goods and merchandise, offered to said Warehouse Company by said Railroad Companies, on the same terms and conditions as herein provided, for goods deliverable at the said Warehouse which may be partially or totally destroyed until said Warehouse has been in whole or in part rebuilt. And in case of the failure of the said Warehouse Company to provide Warehouse facilities with free storage and insurance for the periods stipulated in this contract, then the 35 cents terminal charge per net ton of 2,000 pounds and guarantee of the number of tons per year deliverable to said Warehouse shall be suspended until the Warehouse contemplated by this agreement is rebuilt and in full operation, and the said Railroad Companies shall be put to no additional expense for the handling by Warehouse Company of deliveries to said substituted warehouse, during the period of reconstruction as aforesaid.

Freight Excluded Under Insurance Rules.

Eighth. It is further understood and agreed that the said Warehouse shall not be compelled to receive from the said Railroad Companies for storage under the terms of this agreement, articles or commodities which under the schedule producing the lowest rates of insurance it is forbidden to receive by the rules of the Philadelphia Fire Underwriters Association, regulating insurance upon warehouses and their contents used for general storage purposes.

(fol. 996) Date Minimum Tonnage Clause Effective.

Ninth. The stipulation herein contained, that the number of net tons of freight, goods and merchandise delivered by said Railroad Companies shall not fall below the total of 70,000 tons in each year, shall take effect upon the completion of the warehouse provided to be erected, and during the erection of said warehouse fifty per cent of the minimum payment herein provided shall be paid to the Warehouse Company for the operation of the existing warehouse.

Tenth. The Warehouse Company shall be at liberty in its discretion to further enlarge its storage capacity upon the property aforesaid, by rebuilding or extending the structures upon the southernmost lot first described herein and upon the completion of said new structures, upon plans and specifications approved by the Railroad Companies, and evidenced by the signatures of the President of the Warehouse Company, and the President or Receivers of The Baltimore & Ohio Railroad Company respectively, and filed in their several offices, and the same shall be subject to the options to purchase at net cost as stipulated in paragraph 12 of this agreement; provided that arrangements satisfactory to the parties hereto can be effected for the erection of said additional warehouse.

Cost of Loading and Unloading.

Eleventh. It is the understanding and agreement and so covenanted by the parties hereto that upon all freight and goods and merchandise upon which the Warehouse Company shall receive the terminal payment of 35 cents per net ton as aforesaid, the said Warehouse Company shall be at the entire expense required for unloading the same for storage or delivery or reloading the same for car shipment.

Date Contract Becomes Effective—Termination—Taking Over of Property by B. & O.

Twelfth. It is mutually understood and agreed that this contract shall take effect immediately upon its execution and delivery, and shall continue in force for thirty years, when the said Railroad Companies, parties of the third part, shall take over the land, building, fixtures, machinery (fol. 997) apparatus, the entire plant in full repair, at its cost price, as hereinbefore provided, unless at the expiration of fifteen years from the date hereof the Railroad Companies shall exercise their option now stipulated, to terminate this contract, and take over the said property and plant at said cost price, as just stated; Provided, however, that the option to purchase given above shall not affect the right or power of the Warehouse Company to mortgage said land and property to an amount not exceeding said cost price and bearing interest at not exceeding 5% per annum.

Receivers of B. & O. to Secure Approval of Court—If Not Secured Contract to Terminate—Annual Payment a Preferred Lien.

Thirteenth. It is further mutually understood and agreed that the said Receivers shall apply to the Circuit Court of the United States for the Fourth Circuit,

in the cause wherein they were appointed such Receivers, for a proper order authorizing and approving the execution of this contract by the Baltimore & Ohio Railroad Company and the said Receivers, and the payment by Receivers from their income of the sums herein provided to be paid by the Railroad Companies, and decreeing that the obligation under this contract to pay the minimum sum of $24,500 annually to the Warehouse Company shall be and constitute a first charge and lien upon all the said Baltimore and Ohio Railroad Company's and said Receivers' interest in or claim against the said Schuylkill River East Side Railroad Company, whether by ownership of stock or otherwise, and also decreeing that said annual payment of $24,500 during the term of this contract shall also be a preferred charge upon the corpus of the estate of said Baltimore and Ohio Railroad Company and the proceeds of any sale of said Company's railroad property up to the amount coming into the hands of said Receivers from the cash payment of $70,000, to be made by the Warehouse Company under this contract, whether the Receivers obtain the same by virtue of the claims of said Railroad Company or the Receivers as creditors or as stockholders of the Tradesmen's Grain Elevator & Storage Company. Until such an order of the Court be obtained the Warehouse Company shall not be required to (fol. 998) consummate the purchase herein provided, and should the Court finally refuse to grant such an order or some order equally satisfactory to the President of the Warehouse Company, then this contract shall terminate at the expiration of 30 days from the date of the Court's action, unless within said period the Warehouse Company shall notify the other parties hereto in writing of its election to carry out this contract on its part under such order as the Court may have entered.

In witness whereof the several corporations hereinabove named have hereunto interchangeably set their corporate names by their several Presidents, and caused their common or corporate seals to be affixed, duly attested, and the said John K. Cowen and Oscar G. Murray have hereunto set their hands as Receivers, the day and year first hereinabove written.

THE PENNSYLVANIA WAREHOUSE & SAFE DEPOSIT COMPANY,

By George H. Earle, Jr.
President

Attest: (SEAL)

C. William Funk,
Secretary.

THE TRADESMEN'S GRAIN ELEVATOR & STORAGE COMPANY,

By H. D. Bulkley,
President

Attest: (SEAL)

Saml. Kilpatrick,
Secretary.

THE BALTIMORE AND OHIO RAILROAD COMPANY

By John K. Cowen
President

Attest: (SEAL)

C. W. Woolford,
Secretary

Hugh L. Bond, Jr.,

John K. Cowen
Oscar G. Murray
Receivers

THE BALTIMORE & PHILADELPHIA RAILROAD CO.

By Thomas M. King
President

Attest:

W. H. Ijams (SEAL)
Treasurer

THE SCHUYLKILL RIVER EAST SIDE RAILROAD COMPANY

By Thomas M. King,
President

Attest:

Theodore Frothingham, (SEAL)
Secretary

DEFENDANTS' EXHIBIT NO. 4.

THIS AGREEMENT, Made this Twelfth day of December A D. 1901, by and between the PHIALDELPHIA AND READING RAILWAY COMPANY, hereinafter called the RAILWAY COMPANY, party of the first part, and THE PENNSYLVANIA WAREHOUSING AND SAFE DEPOSIT COMPANY, a corporation of the State of Pennsylvania, hereinafter called the WAREHOUSING COMPANY, party of the second part;

WITNESSETH, That the RAILWAY COMPANY has granted, demised and let, and by these presents does grant, demise and let unto the WAREHOUSING COMPANY for the term of one year, unless this lease is sooner determined by virtue of the provisions hereof from November 1st, 1900, at the rate of Sixteen Thousand six hundred and seventy four dollars and sixty cents ($16,674.60), to be paid monthly in instalments of One

thousand three hundred and eighty-nine dollars and fifty-five cents ($1,389.55):

ALL THAT CERTAIN lot or piece of ground and brick warehouse thereon erected, situate in the Fifteenth Ward of the City of Philadelphia, State of Pennsylvania, bounded and described as follows, to wit:—

BEGINNING at the northeast corner of Callowhill and Sixteenth Streets, thence extending northward along the east side of said Sixteenth Street one hundred and ninety-two (192) feet to the south side of Pennsylvania Avenue, thence extending eastwardly along the south side of said Pennsylvania Avenue one hundred and thirty-seven (137) feet to a point, thence extending southwardly parallel with said Sixteenth Street forty-one (41) feet, thence extending eastwardly parallel to said Callowhill Street forty and nine-tenths (40.9) feet, thence southwardly parallel to said Sixteenth Street one hundred and fifty-one (151) feet to the north side of said Callowhill Street thence westwardly along the north side of said Callowhill Street one hundred and seventy-seven and nine-tenths (177.9) feet to the corner of said Sixteenth Street, the place of Beginning.

SUBJECT, NEVERTHELESS, to the payment of the said rents as reserved as aforesaid, and to the prompt, full and faithful performance by the WAREHOUSING COMPANY of each of the several covenants and stipulations hereinafter contained and written to be kept and performed by it, and to the right of the RAILWAY COMPANY on the happening of any default hereunder, or at any time on three (3) months' notice, to re-enter upon and repossess the whole of the said demised premises as of its first and former estate as hereinafter provided.

EXCEPTING AND RESERVING, however, out of this demise the right of the RAILWAY COMPANY to demand and

require the occupation and use of the demised premises by the WAREHOUSING COMPANY for the handling and storage of merchandise transported and to be transported over the railroads of the RAILWAY COMPANY as hereinafter mentioned and described.

TO HAVE AND TO HOLD the said premises to the said WAREHOUSING COMPANY for and during the said term of one year, and thereafter until either of the parties hereto shall have given three (3) months' notice to the other of its intention to terminate this lease, unless this lease shall have been sooner determined by virtue of the provisions hereof.

IN CONSIDERATION WHEREOF, the said WAREHOUSING COMPANY, hereby covenants and agrees to and with the RAILWAY COMPANY as follows, that is to say:—

FIRST:—To pay to the RAILWAY COMPANY as rent for the demised premises the sum of Sixteen Thousand, six hundred and seventy-four dollars and sixty cents ($16,674.60) per annum, payable in equal monthly instalments of One Thousand, three hundred and eighty-nine dollars and fifty-five cents ($1,389.55), and to be paid monthly on or before the last day of the month for which the same shall accrue, and also to punctually and faithfully pay all taxes, National, State, County or City, including water rent, which may at any time during the term of this agreement be levied or assessed against the property hereby demised or upon the improvements thereon erected or the contents thereof, whether the same be assessed against the land or improvements or contents, separately or as a whole.

SECOND:—At all times while in possession of the demised premises, to keep and maintain, at its own expense, the warehouse thereon, and the machinery therein, in good condition, repair and working order;

to establish and maintain therein at all times a sufficient force, including superintendence, labor and appliances for the purposes set forth; promptly and expeditiously to handle, store, receive and deliver all merchandise or commodities which shall be delivered to said warehouse by the RAILWAY COMPANY for storage and delivery to consignees, or which on the request of the RAILWAY COMPANY shall be deposited at such warehouse by consignors for transportation by said RAILWAY COMPANY, to the full capacity of said warehouse if so much shall be required for said business, including the loading and unloading of all cars; to keep and store such merchandise for the period of ten (10) days or so much thereof and for so much of said period as shall be required from time to time by the Railway Company; to appoint at least one agent who in addition to the General Superintendent of the WAREHOUSING COMPANY (at present Mr. E. B. Griffiths) shall maintain a careful supervision of the operation of the warehouse; shall solicit consignments over the RAILWAY COMPANY's lines to warehouse by mail and by personal application to local shippers and consignees: and one of whom shall visit Western shippers of flour in September and March of each year, or more frequently if suggested by the RAILWAY COMPANY and approved by the WAREHOUSING COMPANY for the purpose of securing consignments over the lines of the RAILWAY COMPANY to and through said warehouse; to perform all the said services and conduct the whole of the said business in a prompt and efficient manner, without charge or expense to the RAILWAY COMPANY, except as herein otherwise expressly provided.

THIRD:—To make the consignees or consignors no other or greater charge or charges for services rendered in handling, receiving, storing or shipping merchandise than are charged for the time being by other

warehousing companies for similar services upon the lines of the Pennsylvania Railroad, or warehousing companies on the lines of the Baltimore & Ohio Railroad, in the City of Philadelphia, unless the consent of the RAILWAY COMPANY to make higher charges shall be given in writing; to pay to the RAILWAY COMPANY when merchandise shall be delivered by it to said WAREHOUSING COMPANY, weekly, all freights and charges due upon said merchandise which shall accrue up to the time of such delivery; it being understood and agreed that for the amount of said charges so paid and until the same are collected from the actual consignees or owners of said merchandise, on delivery of the same to them, the said WAREHOUSING COMPANY shall be entitled to the benefits of a lien on such merchandise and shall have the right and privilege to enforce the same in the name of the said RAILWAY COMPANY to the use of the said WAREHOUSING COMPANY. To keep up a floating policy of insurance, sufficient to cover all property delivered to said WAREHOUSING COMPANY by RAILWAY COMPANY, so as to meet all claims for losses or damage by fire to consignments while the same are in the custody of the WAREHOUSING COMPANY during a period of ten (10) days, and to apply the insurance money so received to the payment of said claim.

FOURTH:—Not to assign this lease in whole or in part, nor underlet the demised premises or any part or portion of the same, without the written consent of the RAILWAY COMPANY first had and obtained.

FIFTH:—To deliver up peaceable possession of the demised premises to the RAILWAY COMPANY on the first day of November A. D. 1901, if demanded, or at any time either before or after that date upon receiving three (3) months written notice so to do from the said RAILWAY COMPANY, or at any time upon the demand of the RAILWAY COMPANY upon the happening of any

default of the WAREHOUSING COMPANY to keep and perform any of the covenants of this lease on its part to be kept and performed notwithstanding the fact that the WAREHOUSING COMPANY may have been paying rent after the expiration of the term hereinbefore created, and but for this covenant would be in possession as a tenant from year to year. PROVIDED, HOWEVER, that no determination of the said tenancy shall be effective to require the surrender of possession by the WAREHOUSING COMPANY of so much or such parts of the warehouse as shall be actually occupied by goods and merchandise against which any warehouse receipts shall be outstanding; but all storage charges which shall accrue after the expiration of three months from the date of the termination of this lease shall be collected by the WAREHOUSING COMPANY, and by it accounted for and paid over to the RAILWAY COMPANY.

AND IN CONSIDERATION of the said several covenants and of the facilities to be provided and the services to be so performed as aforesaid by the WAREHOUSING COMPANY, the said RAILWAY COMPANY covenants and agrees as follows:—

FIRST:—To construct or cause to be constructed, and to maintain during the continuance of this agreement, the necessary track connections between its main tracks and the said warehouse.

SECOND:—To deliver to the WAREHOUSING COMPANY during the continuance of this contract, for storage and warehousing only, in cars on said track connections, so far as under existing contracts it may be able to do so, all flour which it, the RAILWAY COMPANY, can control, which shall have been transported over its lines and consigned for delivery to local points in the City of Philadelphia within the district bounded by Broad Street on the East, by Girard Avenue on the

north, by the Schuylkill River on the west and by South Street on the south; and all general merchandise (except as hereinafter otherwise provided) which shall have been transported by it for delivery within the said limits which the RAILWAY COMPANY may desire to place in store; to the full capacity of said warehouse (reserving the right to store any excess over the capacity of said warehouse at any other point or place); to constitute and appoint the WAREHOUSING COMPANY as its, the RAILWAY COMPANY's agent and warehouseman for all such merchandise so delivered by the RAILWAY COMPANY, such agency to extend, however, only to the receipt, storage and delivery of consignments to and from the RAILWAY COMPANY, and to the collection of freights and charges thereon, but such agency shall not be held or taken to relieve the WAREHOUSING COMPANY from its liability or responsibility as a warehouseman, nor from claims for loss or damage which may arise by reason of its own acts or omissions. PROVIDED, HOWEVER, that the WAREHOUSING COMPANY shall not be required by virtue hereof to receive or keep in store any of the following articles:—Acids, Alcohol, Broom Corn, Cotton Wadding or Bats, Hay or straw, Hemp, Jute, Jute Yarns, Jute Butts, Jute Rejections, Lime, Naval Stores, Oils, Paints, Paper Stock, Rags, Saltpetre, Sisal Grass, Turpentine, Varnish, Whiskey, Nitre or Nitrates; but the WAREHOUSING COMPANY shall nevertheless handle the same or such parts or proportions thereof as will not affect the present rate of insurance, and shall for that purpose receive consignments of the same unless and until it shall notify the RAILWAY COMPANY not to accept consignment thereof through the said warehouse.

THIRD:—To pay to the said WAREHOUSING COMPANY, as a terminal allowance for the facilities so to be afforded and the services so to be rendered as here-

inbefore provided, thirty (30) cents per ton gross or net according to classification, for each and every ton of merchandise received, handled and stored by the WAREHOUSING COMPANY, save and except such merchandise as shall have been shipped to or from the waters of New York Bay, or via New York to or from points beyond, as to which New York traffic the RAILWAY COMPANY shall pay twenty-five (25) cents per ton, gross or net, according to classification, for such facilities and services; to make payments of all amounts to accrue under this paragraph during each month, on or before the fifteenth day of the succeeding month. PROVIDED, HOWEVER, that the said payments shall not be made by the RAILWAY COMPANY in respect of any merchandise transported by it for which it shall have only rendered a switching or transfer service, to or from other lines of railroad or to or from other warehouses, in which case the WAREHOUSING COMPANY may decline to receive such merchandise in any case where it shall be unable to collect said terminal charge from the person or railroad company offering to send the same to said warehouse.

IT IS FURTHER MUTUALLY COVENANTED AND AGREED, by and between the parties hereto as follows, that is to say:—

FIRST:—That, notwithstanding any of the provisions hereof, either party hereto shall have the right and privilege of terminating this contract and the term hereby demised upon giving to the other three (3) months' notice in writing of its intention so to do.

SECOND:—That, immediately at and upon any default of the WAREHOUSING COMPANY well and faithfully to keep and perform any of the several covenants and stipulations herein contained and written by it the said WAREHOUSING COMPANY to be kept and per-

formed, the RAILWAY COMPANY may at its option re-enter upon said demised premises and take possession of the same, and any and all structures, buildings, improvements and appurtenances thereon erected and thereunto belonging, and all right, title, interest and estate of the WAREHOUSING COMPANY in and to the same and every part thereof shall thereupon cease and determine, and the same shall at once vest in the said RAILWAY COMPANY.

THIRD:—That, notwithstanding the termination of this agreement for any cause by virtue of any of the provisions hereof, each party shall have recourse against the other for any balance of money that shall have accrued under any of the covenants and stipulations hereof, including a just and proper allowance of the WAREHOUSING COMPANY for any proportionate overpayment on account of rent or taxes.

FOURTH:—It is not intended by any clause herein contained providing for the maintenance and return of the premises in good condition, repair and working order, that the WAREHOUSING COMPANY shall be obliged to make good any loss or injury to the demised premises occasioned by fire or by action of the elements. In case of such injury it shall be the duty of the Railway Company to repair the damage or injury without delay unless such damage shall be material and substantial, in which case the RAILWAY COMPANY may elect so to repair the damage or injury or to terminate this lease at its option. To such as the business shall be interfered with during the time of such repair there shall be an allowance of rent in proportion to the time consumed in the reparation of the portion of the building thereby affected. The covenant to surrender in good order shall be subject to this understanding that such surrender shall be subject to injury occasioned in the way designated.

IN WITNESS WHEREOF the parties hereto have caused their respective corporate seals to be hereunto affixed, duly attested, the day and year first herein written.

Signed, sealed and delivered in the presence of:

PHILADELPHIA AND READING RAILWAY CO.

By

George F. Baer

President

Attest:

W. R. Taylor

Secretary.

THE PENNSYLVANIA WAREHOUSING AND SAFE DEPOSIT COMPANY, By

A. M. Bright

George H. Earle, Jr.,

President

Attest:

Wm. Rommel, Jr.

Secretary.

DEFENDANTS' EXHIBIT NO. 5.

Inq. 6A 5 14 1919

UNITED STATES RAILROAD ADMINISTRATION
Director General of Railroads
PENNSYLVANIA RAILROAD EASTERN LINES
West Jersey & Seashore Railroad
New York Philadelphia & Norfolk Railroad
Huntingdon & Broad Top Mountain Railroad
Office of Federal Manager

Philadelphia May 29, 1919.

Subject: Increase in loading and unloading allowance to Merchants' Warehouse Co., from 35 to 50 cents per ton. C. H. M. 5-26.
Respectfully referred to
Mr. G. D. Ogden,
Freight Traffic Manager.
For the necessary arrangements.

(Signed) Elisha Lee
Federal Manager.

(Seal)
Director General of
Railroads: 1918

Inq. 6 5 6 1919
(Seal)
Pennsylvania Railroad
Federal Manager's Office
May 28, 1919 P. M.

UNITED STATES RAILROAD ADMINISTRATION
Director General of Railroad

May 26, 1919.

C. H. Markham
Regional Director
Broad Street Station
Philadelphia

Allegheny Region
Unloading Allowances to Merchants' Warehouse Company, Philadelphia.

Mr. Elisha Lee,
Federal Manager, P. R. R., Etc.,
Philadelphia.

Dear Sir:

I enclose copy of my letter of this date to Mr. Chambers, respecting allowances to the Merchants' Warehouse Company.

Please arrange for prompt changes in your tariffs in accordance therewith.

Yours truly,

(Signed) C. H. Markham
Regional Director

(Seal)
Director General of
Railroads: 1918

Inq. 6 3 18 1919

UNITED STATES RAILROAD ADMINISTRATION
Director General of Railroads

C. H. Markham
Regional Director
Allegheny Region

Broad Street Station
Philadelphia

May 26th, 1919

Unloading Allowances to Merchants' Warehouse Company, Philadelphia.

Mr. Edward Chambers,
Director—Division of Traffic,
Washington, D. C.

Dear Sir:

Attached is copy of Section 5 of contract between the Pennsylvania Railroad Company and the Merchants' Warehouse Company.

In accordance therewith, the Merchants' Warehouse Company, under date of January 28th, 1919, served formal notice upon the Pennsylvania Railroad Company, the Regional Director and Federal Manager Lee. A copy of one of these notices is enclosed herewith.

After consultation with Mr. Geo. Stuart Patterson, counsel of the Pennsylvania Railroad, it was decided to advise the Merchants' Warehouse Company that the Administration would not arbitrate the question, but would discuss with it the proper adjustment of the matter. After several conferences, it has been agreed to increase the 35¢ loading and unloading allowance to 50¢ per net ton, same to become effective as soon as tariffs can be issued, the question of retroactiveness to be left for further consideration. The Pennsylvania Railroad has been instructed to revise its tariffs accordingly.

In view of the unusual nature of this contract and the fact that it is costing the railroads from 60¢ to 64¢ per ton to perform exactly the same service at Cupples Station, St. Louis, I am sure you will find this adjustment of the matter satisfactory.

Yours truly,

Regional Director.

DEFENDANTS' EXHIBIT NO. 6.

1927

Warehouses	P. R. R. Cars	P. R. R. Weight	B. & O. Cars	B. & O. Weight	Reading Cars	Reading Weight	Total Cars	Total Weight	Per Cent Cars	Per Cent Weight
erchants Warehouse Co.	15,800	668,117,862			275*	8,836,940*	16,075	676,954,802	42	46
nna. Warehousing & Safe Deposit Co.	398	20,228,829	1,393	49,386,806	6,349	290,440,346	8,140	360,055,981	21	24
iley Warehouses	915	29,425,128	132	5,462,204	274	10,986,984	1,321	45,874,316	3	3
rminal Warehouse Co.	4,316	121,243,420			5,744	189,960,592	10,060	311,204,012	26	22
Other Warehouses	692	18,590,330	4	128,110	1,929	51,907,220	2,625	70,625,660	8	5
Total	22,121	857,605,569	1,529	54,977,120	14,571	552,132,082	38,221	1,464,714,771	100	100

*contains shipments handled by B. & O. as well as Reading

	Cars	Weight
Reading & B. & O.	16,101	607,109,202
P. R. R.	22,121	857,605,569

1928

Warehouses	P. R. R. Cars	P. R. R. Weight	B. & O. Cars	B. & O. Weight	Reading Cars	Reading Weight	Total Cars	Total Weight	Per Cent Cars	Per Cent Weight
erchants Warehouse Co.	14,468	609,808,087			270*	8,266,195*	14,738	618,074,282	39	44
nna. Warehousing & Safe Deposit Co.	241	12,901,397	1,093	38,451,732	6,273	292,760,253	7,607	344,113,382	21	24
iley Warehouses	749	20,525,170	100	3,957,891	342	13,539,882	1,191	38,022,943	3	2
rminal Warehouse Co.	4,437	114,092,009			6,630	214,056,747	11,067	328,148,756	29	24
l Other Warehouses	712	20,455,520	2	83,645	2,018	63,759,820	2,732	84,298,985	8	6
Total	20,607	777,782,183	1,195	42,493,268	15,533	592,382,897.	37,335	1,412,658,348	100	100

*B. & O. as well as Reading

	Cars	Weight
Reading & B. & O.	16,728	634,876,165
P. R. R.	20,607	777,782,183

1929

Warehouses	P. R. R. Cars	P. R. R. Weight	B. & O. Cars	B. & O. Weight	Reading Cars	Reading Weight	Total Cars	Total Weight	Per Cent Cars	Per Cent Weight
chants Warehouse Co.	13,326	562,226,326			319*	9,803,867*	13,645	572,030,193	37	42
na. Warehousing & fe Deposit Co.	294	13,235,012	1,158	37,748,549	6,201	289,518,228	7,653	340,501,789	21	24
ey Warehouses	845	23,734,786	148	5,501,210	457	20,709,160	1,450	49,945,156	4	4
minal Warehouse Co.	4,969	123,434,649			6,400	209,994,308	11,369	333,428,957	31	24
Other Warehouses	775	20,229,512	2	71,400	2,098	61,301,932	2,875	81,602,844	7	6
Total	20,209	742,860,285	1,308	43,321,159	15,475	591,327,495	36,992	1,377,508,939	100	100

*B. & O. and Reading

	Cars	Weight
B. & O. and Reading	16,783	634,648,654
P. R. R.	20,209	742,860,285

1930

Warehouses	P. R. R. Cars	P. R. R. Weight	B. & O. Cars	B. & O. Weight	Reading Cars	Reading Weight	Total Cars	Total Weight	Per Cent Cars	Per Cent Weight
chants Warehouse Co.	10,620	468,349,022			195*	6,264,184*	10,815	474,613,206	36	37
na. Warehousing & fe Deposit Co.	384	26,362,332	1,068	41,031,390	6,391	317,591,323	7,843	384,985,045	26	30
y Warehouses	895	35,251,001	244	17,509,634	329	15,601,194	1,468	68,361,829	4	6
minal Warehouse Co.	4,067	132,190,883			4,339	158,734,652	8,406	290,925,535	28	23
minal Commerce Bldg.					403	12,443,445	403	12,443,445	1	1
Other Warehouses	407	10,295,090	2	51,600	1,232	38,652,565	1,641	48,999,255	5	3
Total	16,373	672,448,328	1,314	58,592,624	12,889	549,287,363	30,576	1,280,328,315	100	100

* B. & O. as well as Reading

	Cars	Weight
B. & O. and Reading	14,203	607,879,987
P. R. R.	16,373	672,448,328

1931

Warehouses	P. R. R. Cars	P. R. R. Weight	B. & O. Cars	B. & O. Weight	Reading Cars	Reading Weight	Total Cars	Total Weight	Per Cent Cars	Per Cent Weight
erchants Warehouse Co.	8,190	353,927,343			247*	9,659,858*	8,437	363,587,201	30	32
nna. Warehousing & Safe Deposit Co.	348	18,238,375	978	36,074,354	5,137	253,208,395	6,463	307,521,124	23	27
ley Warehouses	547	22,178,749	93	4,676,941	447	27,207,700	1,087	54,063,390	3	5
rminal Warehouse Co.	3,461	130,116,028			2,540	111,018,833	6,001	241,134,861	21	22
rminal Commerce Bldg.					5,214	94,189,220	5,214	94,189,220	18	9
l Other Warehouses	418 ~~413~~	12,482,051 ~~13,010,524~~			1,333	41,871,353	1,751 ~~1,746~~	54,353,404 ~~54,881,877~~	5	5
Total	12,964 ~~12,959~~	536,942,546 ~~537,471,019~~	1,071	40,751,295	14,918	537,155,359	28,953 ~~28,948~~	1,114,849,400 ~~1,115,377,673~~	100	100

*B. & O. as well as Reading

	Cars	Weight
B. & O. and Reading	15,989	577,906,654
P. R. R.	12,959	537,471,019

1932

Warehouses	P. R. R. Cars	P. R. R. Weight	B. & O. Cars	B. & O. Weight	Reading Cars	Reading Weight	Total Cars	Total Weight	Per Cent Cars	Per Cent Weight
erchants Warehouse Co.	5,082	211,316,797			381*	14,326,304*	5,463	225,643,101	27	27
nna. Warehousing & Safe Deposit Co.	591	38,151,530	710	30,087,874	3,081	168,853,727	4,382	237,093,131	20	28
iley Warehouses	577	25,427,228	56	3,838,153	531	38,401,409	1,164	67,666,790	5	9
rminal Warehouse Co.	1,941	60,994,497			2,126	95,955,896	4,067	156,950,393	20	19
rminal Commerce Bldg.					4,804	95,306,123	4,804	95,306,123	24	12
1 Other Warehouses	305 ~~310~~	10,119,270 ~~9,590,797~~			730	26,117,337	1,035 ~~1,040~~	36,236,607 ~~35,708,134~~	4	5
Total	8,496 ~~8,501~~	346,009,322 ~~345,480,849~~	766	33,926,027	11,653	438,960,796	20,915 ~~20,920~~	818,896,145 ~~818,367,672~~	100	100

*B. & O. as well as Reading

	Cars	Weight
B. & O. and Reading	12,419	472,886,823
P. R. R.	8,501	345,480,849

1933

Warehouse	Total Cars	Total Weight	Per Cent Cars	Per Cent Weight
Merchants Warehouse Company	5,410	213,763,851	26	
Penna. Warehousing & Safe Deposit Co.	4,115		19	
Bailey Warehouses	1,249		6	
Terminal Warehouse Company	3,872		18	
All Other Warehouses*	6,568		31	
Total	21,214		100	

In addition to the number of carloads reported above, the following shipments, measured by weight, were handled in 1933:

Penna. Warehousing & Safe Deposit Co	29,725 lbs.
Bailey Warehouses	27,915 "
Terminal Warehouse Company	6,144,606 "
All other Warehouses*	205,017 "

*Including the number of carloads handled by the Terminal Commerce Building.

DEFENDANTS' EXHIBITS NOS. 7 AND 8.

(By agreement of counsel, Defendants' Exhibits Nos. 7 and 8, consisting of certain Railroad tariffs, are not reprinted here because said tariffs are fully set forth in the narrative transcript of the testimony. However, Rule 27 from Official Classification No. 48, constituting a part of said Railroad Tariffs, is printed in full in this Bill of Exceptions. It is further agreed that the effective date of said Rule 27 was February 10, 1925):

RULE 27.

"Section 1. Owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers, carried at carload ratings.

"Section 2. Owners are required to load into or on cars heavy or bulky freight for forwarding by rail

carriers, and to unload from cars heavy or bulky freight received by rail carriers, carried at less than carload ratings, which cannot be handled by the regular station employes or at stations where the carrier's loading or unloading facilities are not sufficient for handling.

"Section 3. Owners must observe carriers' rules regulating the safe loading of freight and protection of equipment. Lading must be securely blocked or braced and when in closed cars must be away from car doors, and weight of lading must be approximately the same on each side of car.

"Section 4. When articles are loaded on open cars small detachable parts must be removed and placed in wooden boxes or secured within the article. Boxes must be encircled at ends with iron straps and securely attached to the article or to floor of car. Such boxes must be specified on shipping orders and bills of lading. Fragile parts not detached must be protected."

DEFENDANTS' EXHIBIT NO. 9.

(By agreement of counsel, Defendants' Exhibit No. 9, consisting of a map of Philadelphia with the numerous warehouses marked thereon, is not printed in the Bill of Exceptions because of its size.)

DEFENDANTS' EXHIBIT NO. 12.

(By agreement of counsel the following portions of Defendants' Exhibit No. 12, which exhibit was a certified copy of the proceedings before the Interstate Commerce Commission, are printed in this Bill of Exceptions.)

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket No. 20968

Filed April 26, 1928

JAMES GALLAGHER
NORTHEASTERN WAREHOUSE COMPANY
WALTER A. BAILEY
TERMINAL WAREHOUSE COMPANY
Complainants

Vs.

THE PENNSYLVANIA RAILROAD COMPANY
Defendant

FORMAL COMPLAINT.

The complaint of the above named complainants respectfully shows:

I.

(a) That at all times mentioned herein James Gallagher, complainant herein, trading and doing business under the name and style "Gallagher's Warehouses," had a general office at No. 50 South Third Street in the city of Philadelphia in the state of Pennsylvania and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia in carrying on his said warehouse business.

(b) That at said times the Northeastern Warehouse Company, complainant herein, was a corporation organized and existing under the laws of said Pennsylvania; had a general office at Sedgely and Erie Avenue in said Philadelphia and, at said Philadelphia,

conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia in carrying on its said warehouse business.

(c) That at said times Walter A. Bailey, complainant herein, trading and doing business under the name and style "Bailey Warehouses," had a general office at Delaware Avenue and South Streets in said Philadelphia and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia in carrying on his said warehouse business.

(d) That at said times the Terminal Warehouse Company, complainant herein, was a corporation organized and existing under the laws of said Pennsylvania; had a general office at Delaware and Fairmount Avenues in said Philadelphia and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia in carrying on its said warehouse business.

II.

That at said times the Pennsylvania Railroad Company, the defendant, was a corporation organized under the laws of Pennsylvania and was a common carrier engaged in the transportation of property wholly by railroad, for hire, between said Philadelphia, a point on its railway route, and various points outside the state of Pennsylvania, and, as such common carrier, was subject to the provisions of the Interstate Commerce Act.

III.

(a) That at said times the Merchants Warehouse Company, Inc. was a corporation organized under the

laws of said Pennsylvania; had a general office at No. 10 Chestnut Street in said Philadelphia and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia and competed with each of the complainants in carrying on its said warehouse business.

(b) That at said times The Quaker City Cold Storage Company, Inc. was a corporation organized and existing under the laws of Pennsylvania; had a general office at No. 211 Callowhill Street in said Philadelphia; occupied and used warehouses and warehouse facilities in said Philadelphia; conducted a warehouse business at said Philadelphia and in the conduct of that business competed with complainants.

(c) That, for convenience, said Merchants Warehouse Company and said Quaker City Cold Storage Company, Inc. collectively are referred to herein as the subsidized warehouse companies.

IV.

(a) That during the period of time from April 27, 1926 to the date of the filing of this complaint, herein called the period of two years, each of the complainants and said subsidized warehouse companies in the conduct of his or its warehouse business, shipped numerous carloads, and smaller lots of property outbound from their warehouses in said Philadelphia to various points outside the state of Pennsylvania and tendered said property to defendant for transportation.

(b) That during said period of two years each of the complainants and said subsidized warehouse companies, in the conduct of his or its warehouse business, caused numerous carloads, and smaller lots, of prop-

erty to be shipped from various points outside the state of Pennsylvania to said Philadelphia and to be delivered to them by the defendant at their warehouses in said Philadelphia.

(c) That during said period the defendant and its connecting lines transported said property, for hire, in interstate commerce between said warehouses in Philadelphia and said points outside the state of Pennsylvania.

(d) That said property which defendant transported for complainants was similar to the property which defendant transported for said subsidized warehouse companies and the defendant performed said transportation service contemporaneously and under substantially similar circumstances and conditions.

V.

(a) That at various times during said period of two years the defendant gave allowances of 50 cents per ton and of other amounts per ton to said subsidized warehouse companies out of its published freight rates for said transportation of said property to and from warehouses of said subsidized warehouse companies.

(b) That certain of said allowances are referred to in defendant's published tariff bearing the number G. O. I. C. C. No. 14400.

VI.

(a) That at the times the defendant transported the property, as alleged in Paragraph IV above, the defendant charged, collected and received its filed and published rates applicable to said transportation service and, later, at various times, the defendant, by the means of the allowances, special rates, rebates, draw-

backs and concessions, as alleged in Paragraph V above, which were devices used for the purpose of facilitating violations of Sections 2 and 3 of the Interstate Commerce Act and Section 1 of the Elkins Act, refunded and remitted to said subsidized warehouse companies part of the defendant's said filed and published rates which were lawfully applicable to said transportation of property performed by defendant for said subsidized warehouse companies.

(b) That through and by the means of the said devices the defendant transported said property for said subsidized warehouse companies at net rates which were materially less than its filed and published rates which it charged and collected for similar transportation of property for complainants.

VII.

That by reason of the facts stated in the foregoing paragraphs complainants have been subjected to the payment of rates and charges for transportation which were, when exacted, and still are unjustly discriminatory in violation of Section 2 of said Act, and, unduly preferential of said subsidized warehouse companies, competitors of complainants, and unduly prejudicial to complainants in violation of Section 3 of said Act. That each of the complainants has been injured thereby to his or its damage in a large sum of money.

VIII.

Wherefore complainants pray that defendant may be required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendant to cease and desist from the aforesaid violations of said Act and also pay to each of complainants by way of reparation for said damage, and, for additional damage arising from simi-

lar unlawful conduct of defendant during the prosecution of this case, such sum of money as, in view of the evidence to be adduced herein, the Commission shall determine that each of the complainants is entitled to as an award of damages, with interest, under the provisions of said Act for violation thereof and that such other and further order or orders be made as the Commission may consider proper in the premises.

James Gallagher
Northeastern Warehouse Company
Walter A. Bailey
Terminal Warehouse Company,
Complainants

By John J. Hickey
800 Southern Building,
Washington, D. C.
Attorney for Complainants

Dated at Washington, D. C.
April 27, 1928.

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket No. 20968 (Sub. 1)

Filed April 26, 1928

WALTER A. BAILEY
TERMINAL WAREHOUSE COMPANY
Complainants

Vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY
Defendant

FORMAL COMPLAINT

The complaint of the above named complainants respectfully shows:

I.

(a) That at all times mentioned herein Walter A. Bailey, complainant herein, trading and doing business under the name and style "Bailey Warehouses," had a general office at Delaware Avenue and South Streets in the city of Philadelphia in the state of Pennsylvania and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia in carrying on his said warehouse business.

(b) That at all said times the Terminal Warehouse Company, complainant herein, was a corporation organized and existing under the laws of said Pennsylvania; had a general office at Delaware and Fairmount Avenues in said Philadelphia and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at sev-

eral locations in said Philadelphia in carrying on its said warehouse business.

II.

That at said times The Baltimore and Ohio Railroad Company, the defendant, was a duly organized corporation and was a common carrier engaged in the transportation of property wholly by railroad, for hire, between said Philadelphia, a point on its railway route, and various points outside the state of Pennsylvania and, as such common carrier, was subject to the provisions of the Interstate Commerce Act.

III.

That at said times The Pennsylvania Warehousing and Safe Deposit Company, herein called the subsidized warehouse, was a duly organized corporation; had a general office at No. 113 South Third Street in said Philadelphia and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia and competed with complainants in carrying on its said warehouse business.

IV.

(a) That during the period of time from April 27, 1926, to the date of the filing of this complaint, herein called the period of two years, the complainants and said subsidized warehouse shipped numerous carloads and smaller lots of property, outbound from their warehouses in said Philadelphia to various points outside the state of Pennsylvania and tendered said property to defendant for transportation.

(b) That during said period of two years the complainants and said subsidized warehouse caused nu-

merous carloads and smaller lots of property to be shipped from various points outside the state of Pennsylvania to said Philadelphia and to be delivered to them by the defendant at their warehouses in said Philadelphia.

(c) That during said period the defendant and its connecting lines transported said property, for hire, in interstate commerce between said warehouses in Philadelphia and said points outside the state of Pennsylvania.

(d) That said property which defendant transported for complainants was similar to the property which defendant transported for said subsidized warehouse and further, the defendant performed said transportation service contemporaneously and under substantially similar circumstances and conditions.

V.

That at various times during said period of two years the defendant gave allowances of Fifty Cents per ton, Thirty-five Cents per ton and of other amounts per ton to said subsidized warehouse out of its published freight rates for said transportation of said property to and from warehouses of said subsidized warehouse.

VI.

(a) That at the times the defendant transported the property, as alleged in Paragraph V above, the defendant charged, collected and received its filed and published rates applicable to said transportation service and, later, at various times, the defendant, by the means of the allowances, special rates, rebates, and drawbacks, as alleged in Paragraph V above, which were devices used for the purpose of facilitating violations of Sections 2 and 3 of the Interstate Commerce

Act, refunded and remitted to said subsidized warehouse part of the defendant's said filed and published rates which were lawfully applicable to, and for, said transportation of property performed by defendant for said subsidized warehouse.

(b) That through and by the means of the said devices the defendant transported said property for said subsidized warehouse at net rates which were materially less than its filed and published rates which it charged and collected for similar transportation of property for complainants.

VII.

That by reason of the facts stated in the foregoing paragraphs complainants have been subjected to the payment of rates and charges for transportation which were, when exacted, and still are unjustly discriminatory in violation of Section 2 of said Act, and, unduly preferential of said subsidized warehouse, competitor of complainants, and unduly prejudicial to complainants in violation of Section 3 of said Act. That each of the complainants has been injured thereby to his or its damage in a large sum of money.

VIII.

Wherefore complainants pray that defendant may be required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendant to cease and desist from the aforesaid violations of said Act and also pay to each of complainants by way of reparation for said damage, and, for additional damage arising from similar unlawful conduct of defendant during the prosecution of this case, such sum of money as, in view of the evidence to be adduced herein, the Commission shall de-

termine that each of the complainants is entitled to as an award of damages, with interest, under the provisions of said Act for violation thereof and that such other and further order or orders be made as the Commission may consider proper in the premises.

WALTER A. BAILEY
TERMINAL WAREHOUSE COMPANY
Complainants

By John J. Hickey
800 Southern Building
Washington, D. C.
Attorney for Complainants.

Dated at Washington, D. C.
April 27, 1928.

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket No. 20968 (Sub 2)

Filed April 26, 1928.

REX & COMPANY, INC.
JAMES GALLAGHER
NORTHEASTERN WAREHOUSE COMPANY
WALTER A. BAILEY
TERMINAL WAREHOUSE COMPANY
INDUSTRIAL COLD STORAGE AND WAREHOUSE COMPANY
Complainants

Vs.

READING COMPANY
Defendant

FORMAL COMPLAINT

The complaint of the above named complainants respectfully shows:

I.

(a) That at all times mentioned herein Rex & Company, Inc. complainant herein, was a corporation organized and existing under the laws of the state of Pennsylvania; had a general office at Philip Street near York Street in the City of Philadelphia in said state and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia in carrying on its said warehouse business.

(b) That at said times James Gallagher, complainant herein, trading and doing business under the name

and style "Gallagher's Warehouses," had a general office at No. 50 South Third Street in said Philadelphia and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia in carrying on his said warehouse business.

(c) That at said times the Northeastern Warehouse Company, complainant herein, was a corporation organized and existing under the laws of said Pennsylvania; had a general office at Sedgley and Erie Avenues in said Philadelphia and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia in carrying on its said warehouse business.

(d) That at said times Walter A. Bailey, complainant herein, trading and doing business under the name and style "Bailey Warehouses," had a general office at Delaware Avenue and South Streets in said Philadelphia and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia in carrying on his said warehouse business.

(e) That at said times the Industrial Cold Storage and Warehouse Company, complainant herein, was a corporation organized and existing under the laws of said Pennsylvania; had a general office at No. 1905 North American Street in said Philadelphia and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia in carrying on its said warehouse business.

(f) That at said times the Terminal Warehouse Company, complainant herein, was a corporation or-

ganized and existing under the laws of said Pennsylvania; had a general office at Delaware and Fairmount Avenues in said Philadelphia and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia in carrying on its said warehouse business.

II.

That at said times Reading Company, the defendant, was a corporation organized under the laws of said Pennsylvania and was a common carrier engaged in the transportation of property wholly by railroad, for hire, between said Philadelphia, a point on its railway route, and various points outside the state of Pennsylvania and, as such common carrier, was subject to the provision of the Interstate Commerce Act.

III.

(a) That at said times The Pennsylvania Warehousing and Safe Deposit Company, was a corporation organized under the laws of said Pennsylvania; had a general office at No. 113 South Third Street in said Philadelphia and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia and competed with complainants in carrying on its said warehouse business.

(b) That at said times the Philadelphia Warehousing and Cold Storage Company, a corporation of the state of Pennsylvania, had a general office at Delaware Avenue and North Street in said Philadelphia; occupied and used warehouses and warehouse facilities located in said city; conducted a warehouse business in said Philadelphia and, in the conduct of that business, competed with the complainants.

(c) That, for convenience, said Pennsylvania Warehousing and Safe Deposit Company and said Philadelphia Warehousing and Cold Storage Company collectively are called the subsidized warehouse companies herein.

IV.

(a) That during the period of time from April 27, 1926 to the date of the filing of this complaint, herein called the period of two years, the complainants and said subsidized warehouse companies shipped numerous carloads and smaller lots of property outbound from their warehouses in said Philadelphia to various points outside the state of Pennsylvania and tendered said property to defendant for transportation.

(b) That during said period of two years the complainants and said subsidized warehouse companies caused numerous carloads and smaller lots of property to be shipped from various points outside the state of Pennsylvania to said Philadelphia and to be delivered to them by the defendant at their warehouses in said Philadelphia.

(c) That during said period the defendant and its connecting lines transported said property, for hire, in interstate commerce between said warehouses in Philadelphia and said points outside the state of Pennsylvania.

(d) That said property which defendant transported for complainants was similar to the property which defendant transported for said subsidized warehouse companies and the defendant performed said transportation service contemporaneously and under substantially similar circumstances and conditions.

V.

(a) That at various times during said period of two years the defendant gave allowance of Fifty Cents per ton, Thirty-five Cents per ton and of other amounts per ton to said subsidized warehouse companies out of its published freight rates for said transportation of said property to and from warehouses of said subsidized warehouse companies.

VI.

(a) That at the times the defendant transported the property, as alleged in Paragraph IV above, the defendant charged, collected and received its filed and published rates applicable to said transportation service and, later, at various times, the defendant, by the means of the allowances, special rates, rebates, and drawbacks, as alleged in Paragraph V above, which were devices used for the purpose of facilitating violations of Sections 2 and 3 of the Interstate Commerce Act, refunded and remitted to said subsidized warehouse companies part of the defendant's said filed and published rates which were lawfully applicable to, and for, said transportation of property performed by defendant for said subsidized warehouse companies.

(b) That through and by the means of the said devices the defendant transported said property for said subsidized warehouse companies at net rates which were materially less than its filed and published rates which it charged and collected for similar transportation of property for complainants.

VII.

That by reason of the facts stated in the foregoing paragraphs complainants have been subjected to the payment of rates and charges for transportation which

were, when exacted, and still are unjustly discriminatory in violation of Section 2 of said Act, and, unduly preferential of said subsidized warehouse companies, competitors of complainants, and unduly prejudicial to complainants, in violation of Section 3 of said Act. That each of the complainants has been injured thereby to his or its damage in a large sum of money.

VIII.

Wherefore complainants pray that defendant may be required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendant to cease and desist from the aforesaid violations of said Act and also pay to each of complainants by way of reparation for said damage, and, for additional damage arising from similar unlawful conduct of defendant during the prosecution of this case, such sum of money as, in view of the evidence to be adduced herein, the Commission shall determine that each of the complainants is entitled to as an award of damages, with interest, under the provisions of said Act for violation thereof and that such other and further order or orders be made as the Commission may consider proper in the premises.

Rex & Company, Inc.
James Gallagher
Northeastern Warehouse Company
Walter A. Bailey
Industrial Cold Storage and Warehouse Company
Terminal Warehouse Company,
Complainants

By John J. Hickey
800 Southern Building,
Washington, D. C.
Attorney for Complainants.

Dated at Washington, D. C.
April 27, 1928

Before the
INTERSTATE COMMERCE COMMISSION

JAMES GALLAGHER, ET AL.

vs

THE PENNSYLVANIA RAILROAD COMPANY

Docket No. 20968

DEFENDANT'S ANSWER

The above named defendant, for answer to the complaint filed in this proceeding, respectfully states:

1. This defendant is without sufficient information to enable it to admit or deny the allegations of paragraph 1 of the complaint, and accordingly prays that, so far as the same be deemed material, the complainant be required to make due proof thereof.

2. This defendant admits that it is a common carrier, engaged in part in interstate commerce, and that as to such commerce it is subject to the Act to Regulate Commerce, approved February 4, 1887, and the acts amendatory thereof and supplementary thereto, so far as the same are constitutional and enforceable.

3. This defendant is without sufficient information to enable it to admit or deny the allegations of paragraph 3 of the complaint, and accordingly prays that, so far as the same be deemed material, the complainant be required to make due proof thereof.

4. The averments of paragraph 4 of the complaint are severally denied.

5. Answering the averments of paragraph 5 of the complaint, leave is craved, for greater certainty, to refer to the tariff therein referred to.

6. The remaining allegations of the complaint are severally denied.

WHEREFORE the defendant prays that the complaint filed in this proceeding be dismissed.

THE PENNSYLVANIA RAILROAD COMPANY
By (Sgd.) V. P. Sumerfield
General Freight Agent

HENRY WOLF BIKLE
Of Counsel

BEFORE THE INTERSTATE COMMERCE COMMISSION

Walter A. Bailey, Terminal Warehouse Company, Complainants v. The Baltimore and Ohio Railroad Company Defendant.	Docket No. 20968 Sub. No. 1 Filed June 1, 1928

ANSWER of The Baltimore and Ohio Railroad Company

1. Answering the allegations contained in paragraph I of the complaint, this defendant states that it is not advised with respect thereto.

II. Answering the allegations contained in paragraph II of the complaint, this defendant admits that it is a common carrier, and that, as such, it is subject to the provisions of the Interstate Commerce Act, and the acts mandatory thereof and supplementary thereto.

III. Answering the allegations contained in paragraphs III and IV of the complaint, this defendant

states that it is not fully advised with respect thereto, but it specifically denies the implication that The Pennsylvania Warehousing and Safe Deposit Company is a subsidized warehouse.

IV. This defendant denies each and every allegation contained in paragraph V of the complaint.

V. Answering the allegations contained in paragraph VI of the complaint, this defendant admits that on any property which it transported, it charged, collected and received its filed and published rates lawfully on file with the Interstate Commerce Commission, but it denies each and every other allegation contained in said paragraph.

VI. This defendant denies each and every allegation contained in paragraph VII of the complaint.

WHEREFORE, having answered fully, this defendant asks that the complaint herein be dismissed.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
By (Signed) ARCHIBALD FRIES,
Vice-President.

(Signed) CHARLES R. WEBBER
Attorney for the Baltimore
and Ohio Railroad Company.

BEFORE THE INTERSTATE COMMERCE COMMISSION.

REX & COMPANY, INC. ET AL.	I. C. C. DOCKET
VS.	No. 20968
	Sub. No. 2
READING COMPANY	Filed June 4, 1928

READING COMPANY, the defendant named in the above entitled proceeding, for its answer respectfully shows.

I. This defendant has no information with respect to the averments of paragraph I but believes same to be substantially correct.

II. This defendant admits that it is a common carrier, to some extent engaged, with its connections, in the transportation of passengers and property between points in different States of the United States, and that, as such common carrier, it is subject to the provisions of the Act to Regulate Commerce, approved February 4th, 1887, and those of the Acts amendatory thereof or supplementary thereto, insofar as such provisions are constitutional and legal.

III. Sub paragraphs (a) and (b) are believed to be correct but it is denied that said Pennsylvania Warehousing and Safe Deposit Company and said Philadelphia Warehouse and Cold Storage Company are "subsidized" by this defendant.

IV. It is denied that the said Pennsylvania Warehousing and Safe Deposit Company and said Philadelphia Warehouse and Cold Storage Company are "subsidized" by this defendant. This defendant is without sufficient information to enable it to admit or deny the remaining averments of the corresponding paragraph of the complaint and demands due proof thereof.

V. It is denied that this defendant gave any allowance out of its published freight rates to the warehouse companies referred to in the corresponding paragraph of the complaint and it is further denied that the said warehouse companies were or are "subsidized" by this defendant. On the contrary it is averred that while payments have been made by this defendant to the said warehouse companies in connection with traffic handled to and from their warehouses, said payments were not subsidies but covered service rendered and facilities provided by the warehouse companies for this defendant in connection with the handling of such traffic.

VI, VII, VIII. The averments of the corresponding paragraphs are denied and it is further denied that complainant is entitled to the order or orders prayed for or to reparation. Therefore defendant prays that the said complaint be dismissed.

READING COMPANY

By (Signed) H. C. STAUFFER
al Freight Traffic Manager.

Philadelphia, Pa.
June 2, 1928.

(Signed) W. L. KINTER
Counsel.

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket No. 20968

JAMES GALLAGHER
NORTHEASTERN WAREHOUSE COMPANY
WALTER A. BAILEY
TERMINAL WAREHOUSE COMPANY
Complainants

vs.

THE PENNSYLVANIA RAILROAD COMPANY
Defendant.

PETITION OF THE MERCHANTS' WAREHOUSE COMPANY FOR LEAVE TO INTERVENE

AND Now, June 12th, 1928 comes the petitioner, the Merchants' Warehouse Company and respectfully represents that it has an interest in the matters in controversy in the above entitled proceeding and prays leave to intervene in and become a party to said proceeding.

That your petitioner is a corporation duly organized under the laws of the State of Pennsylvania with its principal office at No. 10 Chestnut street in the City of Philadelphia and State of Pennsylvania.

That under the sixth paragraph of the formal complaint filed in the above matter your petitioner is charged with having accepted and received from the Pennsylvania Railroad Company, the defendant, certain allowances, special rates, rebates, drawbacks and concessions made in violation of Sections 2 and 3 of the Interstate Commerce Act and Section 1 of the Elkins Act which charges are denied.

Both in this respect and in other respects as appears on the face of the complaint, this petitioner has an interest in this proceeding.

WHEREFORE your petitioner prays leave to intervene as a party to these proceedings and file an answer to the complaint with the right to have notice of and appear at any hearings or meetings in connection with this matter and to take testimony, produce and cross-examine witnesses and be heard upon brief or oral argument in the matter.

MERCHANTS' WAREHOUSE COMPANY

By

Sgd. George M. Richardson,

Treasurer.

STATE OF PENNSYLVANIA }
COUNTY OF DELAWARE } ss:

GEORGE M. RICHARDSON being duly sworn doth depose and say that he is Treasurer of the Merchants' Warehouse Company and makes this affidavit in its behalf; that the facts set forth in the foregoing petition for leave to intervene are true, to the best of his knowledge, information and belief.

Sgd. George M. Richardson

Sworn to and subscribed before me this 12th day of June, A. D. 1928.

Sgd. Robert G. Erskine

(Seal) Notary Public

Commission expires Feb. 9, 1929.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 27th day of June, A. D., 1928.

No. 20968

JAMES GALLAGHER ET AL

vs.

THE PENNSYLVANIA RAILROAD COMPANY

ORDER PERMITTING INTERVENTION

Upon consideration of the record in the above-entitled proceeding and application filed on behalf of Merchants' Warehouse Company;

It is ordered, That the said Merchants' Warehouse Company be, and it is hereby, permitted to intervene and be treated as a party hereto, with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses and be heard in brief and on oral argument, if oral argument is heard; provided, however, that the permission to intervene herein granted shall not be construed to allow intervenor to introduce evidence which will unduly broaden the issues raised in the complaint;

It is further ordered, That a copy of the intervening petition be served upon complainants and defendants; and that a copy of this order be served upon each of the parties to this case.

By the Commission:

GEORGE B. McGINTY,
Secretary.

(SEAL)

No. 20968 [1]

JAMES GALLAGHER, Et al, v. PENNSYLVANIA RAILROAD COMPANY

Submitted November 27, 1929. Decided December 28, 1929.

Practice of defendants in making allowances to certain warehouse companies in connection with the loading and unloading of package freight at Philadelphia, Pa., and refusing to make such allowances to complainants, found unjustly discriminatory and unduly prejudicial. Defendants required (1) to cease and desist from publishing or making such allowances, and (2) to cancel their tariff provisions which make the warehouses of the aforesaid companies a part of their respective station facilities at Philadelphia. Reparation denied.

John J. Hickey for complainants.

Herbert J. Campbell for Millers' National Federation, intervener.

Henry Wolf Bikle, Charles R. Webber, W. I. Woodcock, Jr., and W. L. Kinter for defendants.

Wm. A. Glasgow, Jr., and M. Hampton Todd for Merchants' Warehouse Company; Winfred M. Stilwell and H. Edgar Barnes for Pennsylvania Warehousing & Safe Deposit Company; John P. Connelly for Philadelphia Warehousing & Cold Storage Company; and Allen S. Olmstead, 2d, and Wm. A. Glasgow, Jr., for Commercial Exchange of Philadelphia, Grocers' & Importers' Exchange, Philadelphia Board of Trade, Philadelphia Bourse, and Association of Manufacturers' Representatives, Incorporated, interveners.

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(1) This report also embraces No. 20968 (Sub-No. 1), Walter A. Bailey et al. v. Baltimore & Ohio Railroad Company; and No. 20968 (Sub-No. 2), Rex & Company, Incorporated, et al. v. Reading Company, 160 I. C. C.

Report of the Commission

Division 3, Commissioners Aitchison, Taylor, and Porter

Porter, Commissioner:

These cases present practically identical issues, were heard together, and will be dealt with in one report. Exceptions were filed to the report proposed by the examiner, and the issues were orally argued.

Complainants, operators of warehouses at Philadelphia, Pa., by complaints filed April 26, 1928, allege that the practice of defendants in making cash allowances to certain Philadelphia warehouse companies,[2] hereinafter referred to as the contract warehouses, in connection with the handling of interstate shipments of package freight, in carloads and less than carloads, was and is unjustly discriminatory, unduly preferential of the contract warehouses, and unduly prejudicial to complainants, in violation of sections 2 and 3 of the interstate commerce act. We are asked to require defendants to cease and desist from the alleged violations of the act.[3] Reparation also is sought.

The Millers' National Federation intervened in behalf of complainants. Its position is substantially that of complainants and will not be separately stated herein. The Merchants' Warehouse Company, Pennsylvania Warehousing & Safe Deposit Company, Philadelphia Warehousing & Cold Storage Company, Com-

(2) Complainants in No. 20968 name the Merchants' Warehouse Company and the Quaker City Cold Storage Company as being unduly preferred by the Pennsylvania Railroad Company; complainants in No. 20968 (Sub-No. 1) name the Pennsylvania Warehousing & Safe Deposit Company as being unduly preferred by the Baltimore & Ohio Railroad Company; and complainants in No. 20968 (Sub-No. 2) name the Pennsylvania Warehousing & Safe Deposit Company and the Philadelphia Warehousing & Cold Storage Company as being unduly preferred by the Reading Company.

(3) Complainants take the position that the making of these allowances is in violation of section 1 of the Elkins Act and that similar allowances could not properly be made to them.

mercial Exchange of Philadelphia, Philadelphia Board of Trade, Philadelphia, Bourse, Grocers' & Importers' Exchange, and Association of Manufacturers' Representatives, Incorporated, intervened in behalf of defendants. Defendants and interveners in their behalf made a formal motion at the hearing that our orders entered September 17, 1928, authorizing the Millers' National Federation to intervene, be rescinded on the ground that such intervention unduly broadens the issues. This intervener introduced no evidence. The motion is denied.

In all the larger cities, including Philadelphia, public warehouses are customarily used for the receipt, storage, and distribution of merchandise. That these warehouses perform an important public service is undisputed. The merchandise warehouse receives goods in carloads [4] and distributes them in smaller quantities to local jobbers or retailers, or reships them in less-than-carload lots to near-by destinations; issues negotiable and nonnegotiable receipts, provides insurance, and allows credit to be obtained on merchandise stored; provides recoopering, marking, and separation of varieties, and various incidental clerical services. Warehouse services enable manufacturers to keep spot stocks for their customers; equalize production by steadily absorbing the manufacturers' output while eliminating heavy investment in reserve storage space; reduce freight charges and save time in transit through handling goods in carload quantities; reduce fire risk and loss and damage claims; and eliminate the necessity of providing storage space at point of origin. Both complainants and the contract warehouses furnish these services.

The allowances complained of are cash payments made by defendants to the contract warehouses osten-

(4) There is a relatively small inbound movement in less than carloads.

sibly for services rendered in connection with the loading and unloading of package freight.[5] Similar payments are not made to complainants. The conditions under which the allowances are given are set forth in several written agreements, of record herein, between defendants and the contract warehouses. The allowances made by the Pennsylvania are also stated in its tariff G. O.—I. C. C. No. 14400. The remaining defendants do not file tariffs covering their allowances to the contract warehouses. The evidence indicates that no allowances are made on traffic consigned to or by the contract warehouses as such. The form of billing customarily used in the consignment of goods to the contract warehouses is to a named party, care of the warehouse at which the carrier is to make delivery.

The allowances differ in amount and application according to the traffic. In certain instances they are applied to both carload and less-than-carload shipments, inbound and outbound, and in other instances they are given only on inbound carload shipments. They range from 2.5 cents per barrel on flour to 50 cents per ton on other freight. The Pennsylvania gives allowances on inbound and outbound carload and less-than-carload freight handled by the Merchants' Warehouse Company and on inbound carload and less-than-carload dairy freight handled by the Quaker City Cold Storage Company; the Baltimore & Ohio, on inbound and outbound carload freight handled by the Pennsylvania Warehousing & Safe Deposit Company; and the Reading, on inbound carload freight handled by the Philadelphia Warehousing & Cold Storage Company and the Pennsylvania Warehousing & Safe Deposit Company. Neither the Baltimore & Ohio nor the Reading gives allowances to the contract warehouses on less-than-carload freight. No allowances

(5) The term "package freight" does not include automobiles or other motor vehicles.

are made by the Reading on outbound shipments. That the allowances are substantial in amount is indicated by the payments made by the Pennsylvania to the Merchants' Warehouse Company during 1927 of approximately $200,000.

Carload freight carried at carload rates is ordinarily loaded and unloaded by the owner or his agent. In this connection rule 27 of the official classification requires owners to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers, carried at carload ratings. By exceptions to the classification, however, defendants agree to load or unload carload package freight at certain Philadelphia freight stations, except when handled direct to or from cars on team tracks at owner's request. Defendants and interveners in their behalf assert that these freight stations include the facilities operated by the contract warehouses. The Pennsylvania and the Baltimore & Ohio have so provided in their tariffs, but the Reading has no similar tariff provision. The contract warehouses perform the work of loading and unloading carload package freight for defendants pursuant to the agreements heretofore mentioned.

Defendants' practice of loading and unloading carload freight at Philadelphia has been in effect for many years. According to the Pennsylvania the practice first started in connection with the receipt and delivery of freight at water-front stations having no team-track facilities. In time the practice spread to include other Philadelphia stations, not only on the lines of the Pennsylvania but also on the Baltimore & Ohio and the Reading.

The services performed by the contract warehouses do not differ in substance from those rendered by complainants. The warehouses of complainants and those of the contract warehouses are served by

private sidetracks or sidings connecting with the lines of one or more defendants. Both handle the same classes of freight and both obtain business by widespread advertising in prominent trade publications, by sending letters, pamphlets, and circulars to prospective customers offering them their services, and by personal solicitation. There is active and keen competition between complainants and the contract warehouses. Concerns using public warehouse facilities generally select the company offering them the lowest aggregate charge for the distribution of their goods. By means of the allowances the contract warehouses are able to quote lower charges than can complainants.

Complainants urge, among other things, that the allowances are in fact rebates given for the purpose of buying freight traffic controlled by the contract warehouses and causing it to be transported over defendants' lines; that the facilities of the contract warehouses are not railroad freight stations or used by the general public as such; that the contract warehouses are the actual shippers of the freight handled by them; that the contract warehouses do not perform any task for defendants that entitle them to receive allowances; and that the loading and unloading of freight by the contract warehouses is not in fact transportation service and that allowances therefor, being for trade services, are illegal.

Defendants take the position that under their tariffs they are required to load and unload carload and less-than-carload package freight at Philadelphia; that they lawfully employ the contract warehouses as agents to perform these loading and unloading services, and that the allowances paid therefor are compensation for such services; that there is no legal obligation on the part of defendants to make complainants' warehouses their stations or to employ complain-

ants as their agents to load and unload freight; that the contract warehouses are neither consignors nor consignees of the freight handled by them; and that the allowances paid to such warehouses, being for transportation services rendered, are not illegal. The contentions of the contract warehouses and interveners in behalf of defendants are similar to those of defendants.

There is much conflicting testimony in the record with respect to the foregoing contentions. The weight of the evidence, however, supports those advanced by complainants. Among other things, the record is persuasive that the contract warehouses are compensated for the solicitation of freight for movement over the lines of the respective defendants through the payment of the allowances in question; that traffic considerations have been the primary motive for the payment of these allowances; that the facilities of the contract warehouses, while nominally open to the general public as railroad freight stations, are not in fact public stations but are confined to the handling of merchandise for the patrons of the warehouses, and that the services performed by the contract warehouses in connection with the loading or unloading of freight, including the sending of arrival notices, the collection of freight charges, and other incidental matters, are in fact performed for the benefit of the owner of the merchandise rather than for defendants.

While the contract warehouses are not the owners of the goods received or shipped by them, all of defendants' dealings are with these companies and none with the owners of the goods. As to many of the inbound carload shipments the contract warehouses are the only parties to whom delivery of the goods could be made as carload shipments, the real owners being concerns which ship carload merchandise to the contract warehouses for distribution in less-than-carload

lots. The contract warehouses, even though not the owners of the goods, have been given dominion over such goods for transportation purposes, and accordingly for transportation purposes they should be deemed the consignors of shipments from or consignees of shipments to their warehouses. The same is true as to complainants, shipments from and to their warehouses being handled in substantially the same manner.

In McCormick Warehouse Co. v. Pennsylvania R. Co., 148 I. C. C. 299, wherein we found unlawful a similar situation at Baltimore, Md., we said at page 306:

> While the Terminal is not the owner of the goods received and shipped by it, all of the dealings of defendants are with the Terminal and none with the owner of the goods. As to many of the inbound shipments the Terminal is the only party to whom delivery of the goods could be made as carload shipments, the real owners being out-of-town concerns which ship to the Terminal for distribution in less-than-carload lots. It is our view that the Terminal even though not the owner of the goods, has been given dominion over such goods for transportation purposes and that accordingly for transportation purposes it should be deemed the consignor of shipments from and consignee of shipments to its warehouses.

Although contention is here made it has not been shown that there is any distinction in substance as between that case and the case here considered. There, as here, the keystone of the defense is the tariff obligation to load and unload freight at the preferred warehouses. With this as a starting point, defendants then rely upon their right to select their own agencies to carry out their tariff obligations and their further right to limit themselves in that selection. Transfer in St. Louis and East St. Louis by Dray and Truck, 155 I. C. C. 129, 139-142. But where it is shown that

an unlawful discrimination is being worked the mere fact that the machinery for working it is in tariff form can not afford it sanctity. It is fundamental that an unlawful discrimination practiced under authority of a tariff is just as evil as one which is practiced contrary to a tariff. When substance, and not mere form, is considered the conclusion is inescapable that the practices here complained of are unlawful.

In Terminal Warehouse Co. v. United States, 31 Fed. (2d) 951, the district court refused to set aside our order, holding that the allowances considered in the McCormick case were in violation of both sections 2 and 3 of the act.

Prior to the filing of exceptions to the examiner's proposed report all parties conceded that the facts and questions of law in the instant case were the same in substance as those in the McCormick case. In their exceptions and at the oral argument most of the parties opposed to the complaints receded from their position in this respect. The record is persuasive that there is no real distinction between these cases.

Complainants confine the basis of their claim for reparation to damages resulting from shrinkage or diminution of their normal business profits. They urge that they be permitted to submit proof of actual pecuniary loss at a further hearing to be held subsequent to the decision herein, contending that it would be impracticable to make such proof prior to the date the unjust discrimination and undue prejudice is removed. We are not inclined to this view. Complainants have been accorded ample opportunity to present facts supporting an award of reparation. Their case must stand or fall on the facts now of record. The evidence is far too vague and indefinite to warrant the conclusion that complainants have suffered actual pecuniary loss attributable directly to the alleged unlawful practices. Damage must be shown with cer-

tainty to support an award of reparation under findings of unjust discrimination or undue prejudice. Penna. R. R. Co. v. International Coal Co., 230 U. S. 184, 206. Reparation is denied.

Following McCormick Warehouse Co. v. Pennsylvania R. Co., supra, and upon this record, we find that the practice of defendants in making allowances to the contract warehouses in connection with the loading or unloading of package freight at Philadelphia as aforesaid, and refusing to make similar allowances to complainants for performing similar services, results in unjust discrimination, in undue preference of the contract warehouses, and in undue prejudice to complainants. The record discloses that these allowances are nothing more than a device to attempt to lend legality to the payment of rebates to the contract warehouses. It is apparent that the unjust discrimination and undue prejudice can lawfully be corrected only by terminating the allowances. Defendants will therefore be required to cease and desist from publishing or making such discriminatory and preferential allowances. The Pennsylvania and the Baltimore & Ohio will also be required to cancel their tariff provisions which make the facilities of the contract warehouses a part of the respective station facilities of these defendants at Philadelphia.

An appropriate order will be entered.

Commissioner Taylor did not participate in the consideration or disposition of this proceeding.

Before The
INTERSTATE COMMERCE COMMISSION

James Gallagher, Et al.,

vs.

Pennsylvania Railroad Company.

Docket No. 20968.

Walter A. Bailey, Et al.,

vs.

Baltimore and Ohio Railroad Company.

Docket No. 20968, Sub. 1.

Rex and Company, Et al.,

vs.

Reading Company.

Docket No. 20968, Sub. 2.

PETITION OF COMPLAINANTS FOR RECONSIDERATION OF THE CONCLUSIONS OF DIVISION 3, IN RESPECT OF REPARATION, BY THE ENTIRE COMMISSION AND FOR FURTHER HEARING TO ENABLE THE COMPLAINANTS TO PROVE THE AMOUNTS OF REPARATION CLAIMED.

Come now the complainants in the above entitled cases and respectfully petition the whole commission to review and reconsider the conclusions of division 3

in respect of reparation and to set the cases for further hearing to enable the complainants to prove the actual pecuniary loss sustained by each of them.

Division 3, by its report of December 28, 1929, found in substance that the giving of certain allowances to petitioners' competitors, by the defendant carriers, was in violation of sections 2 and 3 of the Interstate Commerce Act. Division 3, by its order of that date, required the defendants to cease and desist from the violations not later than February 10, 1930.

The report of division 3 shows the following conclusions which reflect all of the treatment of the subject of reparation expressed in the report:

> "Complainants confine the basis of their claim for reparation to damages resulting from shrinkage or diminution of their normal business profits. They urge that they be permitted to submit proof of actual pecuniary loss at a further hearing to be held subsequent to the decision herein, contending that it would be impracticable to make such proof prior to the date the unjust discrimination and undue prejudice is removed. We are not inclined to this view. Complainants have been accorded ample opportunity to present facts supporting an award of reparation. Their case must stand or fall on the facts now of record. The evidence is far too vague and indefinite to warrant the conclusion that complainants have suffered actual pecuniary loss attributable directly to the alleged unlawful practices. Damage must be shown with certainty to support an award of reparation under findings of unjust discrimination or undue prejudice. Penn. R. R. Co. v. International Coal Co., 230 U. S. 184, 206. Reparation is denied."

The petitioners make the following showing in support of their petition.

1. The report of division 3 denies the statutory right of complainants to offer any evidence in respect of reparation that accrued subsequent to August 1, 1928.

The unlawful rebating, assailed in the formal complaints, evidently has continued to the present date with resulting continued infliction of losses upon the petitioners. The petition dated January 25, 1930, filed by the Merchants Warehouse Company, one of the receivers of the rebates, gives notice of its intention to continue the litigation in court proceedings. Therefore, the complainants are confronted with an indication of continuance of the rebating with resulting infliction of losses on them during an indefinite period in the future.

The complaints were filed on April 26, 1928. The complainants were enabled to submit their evidence at a public hearing held during the three days ended on August 1, 1928, and they have had no opportunity to offer evidence in respect of reparation that accrued on any later date. The report of division 3, which found the violations that possibly may serve as a basis for reparation, was issued on December 28, 1929, approximately 17 months after that public hearing.

The conclusion expressed in the report of division 3 is that the evidence, adduced by the complainants, is far too vague and indefinite to warrant the conclusion that complainants have suffered actual pecuniary loss attributable to the alleged unlawful practices. The Supreme Court, in Penn. R. R. Co. v. International Coal Company, 230 U. S. 184, 206, prescribed "actual pecuniary loss" as a rule to be used for the measurement of damages.

We submit that, under rule III (r) of the rules of practice, the complainants were required to prove the fact of damage at the hearings held heretofore and

that measurement of their damage, by showing the actual pecuniary losses, by requirement of that rule, is deferred to a further or future hearing.

It is not possible to attempt to prove actual pecuniary loss until the loss has accrued, and the evidence thereof must be based on completed transactions of the past. It necessarily follows, from that premise, that the complainants have had no opportunity to offer any evidence tending to measure the reparation which accrued subsequent to the hearing on August 1, 1928. If the complainants are not granted a further hearing and if the report of division 3 stands the complainants will be denied opportunity, and their statutory right, to offer evidence tending to prove that part of the reparation which accrued for losses inflicted on them subsequent to August 1, 1928.

If the complainants had undertaken to prove their actual pecuniary losses up to August 1, 1928, that proof would not have avoided the need for a further hearing to enable them to prove losses sustained subsequent to that date. Your petitioners cannot prove the aggregate of the reparation due them until cessation of the rebating terminates the accrual of losses. The concentration of the proof of all such losses in one further hearing then will lighten the burden of the Commission and all interested parties.

The position of the complainants differs materially from the position of claimants of reparation arising from violations of section 1 of the act. In the case of certain violations of section 1 the commission found that the assailed rates were, are and will be in violation of that section. In such cases the margin by which the assailed rates exceed the prescribed reasonable rates is a yard stick for measuring past, present and future reparation. But in the cases in hand the commission has not condemned or prescribed any rate and, therefore, the further hearing sought is needed to provide the equivalent of that yard stick.

2. The statute and the opinion of the Supreme Court in Penna. R. R. vs. International Coal Company, 230 U. S. 184, require further hearing on supplementary complaint or abandonment of a large part of claims for reparation under section 2.

As "actual pecuniary loss" is the rule of measurement of reparation the formal complaints, filed on April 28, 1928, apply only to losses that accrued prior to that date of filing and evidently do not cover reparation which accrued subsequent to the date the complaints were filed. The complainants could not, and cannot, invoke anticipation, prediction or estimates or deal with the future in proving actual pecuniary losses. Penna. R. R. v. International Coal Company, 230 U. S. 184, 206. It follows that the formal complaints as filed cover only losses and reparation that accrued prior to the date on which the complaints were filed. Rule III (q) of the rules of practice, which applies to reparation for violation of section 1, evidently adds no force to the complaints in the cases at bar and, therefore, the complainants must file supplementary complaints covering the period subsequent to April 28, 1928. Further hearing cannot be avoided unless the complainants abandon a large part of their lawful claims for reparation or are denied their statutory right to prosecute those claims.

3. Rule III of the commission's rules of practice required the complainants to defer measurement of the damages until a second or future public hearing.

Rule III(r) of the commission's rules of practice reads as follows:

> "If a general rate adjustment is challenged in the complaint, or many shipments or points of origin and destination are involved, it is the prac-

> tice of the Commission to find and determine in its report the issues as to violation of the Act, injury thereby to complainant, and right to reparation and thereafter to afford the parties opportunity to agree or make proof respecting the shipments and amount of reparation due under its finding before entering its order awarding reparation."

The complainants testified that shipments consigned to their warehouses originated in all parts of the United States and embraced virtually all articles and commodities, excepting inflammable articles. described in the Consolidated Freight Classification. Dickson, Rec. 73, 74; Mooney, Rec. 167; Gallagher, Rec. 219; Sullivan, Rec. 265. Under the circumstances rule III(r) of the rules of practice required the complainants to defer measurement of their damage on the numerous shipments until a second or further hearing. Several reports of the commission confirm that construction of rule III. Michigan Hardwood Mfg. Asso. v. Freight Bureau, 27 I. C. C. 32, 36; National Petroleum Association v. M. K. & T. Ry. Co., 58 I. C. C. 417, 418; Mountain Ice Co. v. D. L. & W. R. R., 21 I. C. C. 45, 48, 49; Burns & Knapp v. B. S. & K. Ry. Co. 126 I. C. C. 410, 412.

The commission, speaking of proof of reparation, in Michigan Hardwood Manufacturers Asso. v. Freight Bureau, 27 I. C. C. 32, 36, said:

> "What is true of this case is true of most cases in which reparation is sought. The preliminary issue is always upon the reasonableness of some particular rate. The determination of this question may frequently involve a considerable length of time. The case must first be heard by the Commission. It may then go to the Commerce Court, and from the Commerce Court to the Supreme Court, before any final conclusion can be reached. During this period, while this fundamental question is being determined, parties ought

not to be put to the trouble and expense of filing detailed exhibits, nor ought this Commission to be burdened with the task of receiving and caring for such exhibits unless some substantial purpose is thereby subserved. The complainant should file such statement as informs both this Commission and the defendants of his intention to claim reparation, and the defendant should be sufficiently advised so that the evidence which it will finally desire to use upon the trial of the details may not be dissipated."

At the time of the public hearings in the cases in hand the report of the commission, division 4, in McCormick Warehouse Company v. Pennsylvania R. R. Co., 95 I. C. C. 301, decided July 12, 1925, stood adversely to the contentions of the complainants. Later that report was reversed, 148 I. C. C. 299, decided November 22, 1928. That was an additional reason for deferring proof of the amount of reparation until the report of division 3 on the substantive issues, on December 28, 1929, removed the uncertainty.

4. The petitioners are seeking only the equivalent of rule V of the commission's rules of practice.

The petitioners cannot use rule V or form 5, of the commission's rules of practice, for the measurement of their reparation for violations of section 2. In cases involving reparation for violations of section 1 of the Act where the defendant carriers refuse to verify and sign the form 5 statements the commission grants complainants a further hearing to enable them to prove the amount of the reparation due. Ontario Paper Co. v. C. N. Rys. 95 I. C. C. 66, 75; Best Foods v. C. R. R. Co. of N. J., 95 I. C. C. 738, 739; Houston Packing Co. v. A. T. & S. F. Ry. Co., 102 I. C. C. 385, 387; Mississippi Railroad Commission v. A. & V. Ry. Co., 102 I. C. C. 540, 552. In requesting further hearing the petitioners seek only the equivalent of the rule V procedure which is available to those who prosecute claims for damages under section 1 of the act.

5. The complainants proved all elements of damage except the amount of damage and, under the rules of practice, are entitled to a further hearing to enable them to measure the damage.

The leading case on the subject of reparation based on rebating in violation of section 2 of the Act is Penna. R. R. v. International Coal Co., 230 U. S. 184. According to that case claimants entitled to recover such reparation must show (1) the wrong of the carrier, (2) that that wrong operated to the injury of the claimant, (3) the fact of the damage, and, (4) the amount of the damages. 230 U. S. 200, 204. The amount of damage is the actual pecuniary loss sustained by the claimant. 230 U. S. 206.

We have proved the first three essentials or elements. Under the commission's rules of practice, discussed above, we are entitled to a further hearing to enable us to prove the fourth essential, the amount of the damages, and that is all that the petitioners are seeking herein.

We direct attention to part of the evidence, that relating to proof of the fact of damage, without unduly expanding the discussion to deal with all of the evidence tending to prove the four essentials.

Contracts between the Pennsylvania Railroad Company and its subsidized warehouse concern in effect require the latter to route all of its freight traffic via Pennsylvania R. R. lines. No service, other than that routing of freight, was performed by that warehouse company. The contracts of Reading Company required its subsidized warehouse ally to meet, by the measure or level of its warehouse service charges, the competition of the warehouse company that was subsidized by the rebates given by the Pennsylvania. The Baltimore & Ohio contracts manifest purpose to match these traffic buying devices of the Pennsylvania and

Reading. The pertinent provisions of the contracts are quoted and discussed at pages 25-38 of our brief of December 6, 1928. Repetition of that discussion is unnecessary here. That provision of the Reading contracts has an important bearing here—it shows that the plan underlying the rebating arrangements contemplated the cutting of normal warehouse charges by the subsidized warehouses in their efforts to obtain warehouse business and traffic for the railroads. Of course such cutting of normal warehouse charges would be destructive of the revenues and profits of competing warehouse companies.

Uncontradicted documentary evidence shows that the subsidized warehouse companies cut, or shrunk, normal warehouse charges by affording free distribution of warehouse freight. Exhibits 6, 11, 42 to 51 inclusive. And the testimony is that the allowances, the rebates, enabled them to afford that free service. Rec. 635, 704. The evidence follows the rebates through the trade channels of the receivers of the rebates and shows actual use of the rebates by those receivers to the injury of the complainants, an exceptionally complete showing. The record shows these powerful combinations of carrier and subsidized warehouse ally fixing the market value of warehouse service for the warehouse industry of Philadelphia.

Turning now to the effect of this use of the rebates on the business of the complainants. The injurious effect of the rebates is revealed by the following testimony of one of the complainants relating to the aggregate charge. Rec. 282.

> "Q. Have the allowances been used to divert business from the Terminal Warehouse Company to your subsidized competitors?
>
> "A. Yes.
>
> "Q. Explain that use of the allowances?

"A. There are hundreds of well known concerns that employ warehouses to distribute their products in Eastern cities. We and the subsidized warehouse companies actively compete in soliciting the business of those concerns. Those concerns ship their goods to the warehouse that can offer them the lowest aggregate charge for the distribution of their goods. The aggregate charge is made up of the railroad freight rate to the warehouse and the warehouse charges. Our subsidized competitors are enabled, by the allowances, to quote lower aggregate charges than we can quote and they underbid us and take competitive business away from us."

Seven witnesses for the complainants testified in substance that their businesses were subjected to injury or damage of three kinds, namely, (1) the subsidized warehouse companies, in competitive solicitation of business, underbid the complainants and thereby took certain business away from the complainants, (2) the competitive business which the complainants elected to handle was handled by them at "cut rates" imposed by their subsidized competitors with resulting shrinkage or diminution of their normal business profits, and, (3) the complainants were compelled to surrender to their subsidized competitors the warehouse handling of all flour, heavy density commodities and the inbound freight distributed and delivered promptly after arrival at warehouses. Dickson, Rec. 76-87; Foster, Rec. 122-128; Mooney, Rec. 164-170; Beatty, Rec. 178-180; Rex, Rec. 189; Gallagher, Rec. 220-222; Sullivan, Rec. 282-297. And this testimony is fortified by letters from warehouse patrons demanding "cut rates" of the level or measure fixed by the subsidized warehouse companies. Exhibits 19 to 29, inclusive. The customers of the complainants did not share in the losses—when the complainants refused to

take the losses resulting from "cut rates" the customers transferred their patronage to complainant's subsidized competitors. Sullivan, Rec. 284.

The description of the second kind of business or transactions, described in the preceding paragraph, clearly shows actual losses on actual transactions and does not indicate theoretical or speculative damages.

When the complainants accepted and handled competitive business they incurred the regular expenses incident thereto in the form of investment charges, or rents, taxes, cost of maintenance of facilities and cost of labor assignable to the handling of that competitive freight or business through their warehouses. Dickson, Rec. 80, 81; Sullivan, Rec. 285, 286. The competing warehouse companies, subsidized by the rebates, afforded handling and distribution of warehouse freight free of charge. And the rebates enabled them to afford the free service. Richardson, Rec. 635; Justice, Rec. 704. Such free service supported by unlawful rebates undoubtedly reflects a subnormal basis of warehouse rates and charges. The imposition of that subnormal scale of charges upon the complainants deprived the complainants of opportunity to exact reasonably compensatory warehouse charges that would yield the revenue needed to pay their investment charges, cost of maintenance, taxes and cost of labor. Dickson, Rec. 80, 81; Sullivan, Rec. 285, 286. The rebates yielded such revenue for the subsidized warehouse companies. Richardson, Rec. 635; Justice, Rec. 704. The uncontradicted testimony of the seven witnesses referred to in the preceding paragraphs is that the complainants had only the alternative of accepting competitive business at the subnormal rates imposed by their subsidized competitors or surrendering the business to their subsidized competitors. The evidence has established the fact of loss, to the complain-

ants, resulting from shrinkage of normal charges and revenues accompanied by the regular burden of investment charges, taxes, maintenance expenses and cost of labor which obviously resulted in diminished profits and actual pecuniary loss.

Where, as is the case here, the selling prices that a claimant of reparation was able to obtain were fixed by its competitor, aided by unlawful rates, such claimant is entitled to recover reparation for a violation of section 3 of the act. Lester & Toner v. L. I. R. R. Co., 83 I. C. C. 251, 253; Foster Lumber Co. v. V. & S. R. R. Co., 112 I. C. C. 651-654; Inman-Poulsen Lumber Company v. S. P. Co., 61 I. C. C. 185, 187. The doctrine of those cases evidently applies with equal force to reparation under section 2 of the act. And in the cases at bar warehouse charges and revenues of the complainants were controlled, fixed and diminished or totally destroyed by means of an unlawful conspiracy between the defendant carriers and the competitors of the complainants.

The shrinkage or diminution of normal business profits, as claimed by the complainants, is based on actual and not theoretical business transactions, that is, it is based on actual business transaction which the complainants handled under the subnormal or "cut" warehouse charges imposed by their subsidized competitors. Such curtailment or diminution of normal business profits is a foundation for reparation. Penna. R. R. Co. v. International Coal Company, 230 U. S. 184, 206; Cornell v. L. V. R. R., 57 I. C. C. 157, 163; Foster Lumber Co. v. V. & S. R. R. Co., 112 I. C. C. 651, 654; Puget Sound & Cascade Ry. Co. v. Director General, 91 I. C. C. 467, 470, 471. Damages also may be recovered for unlawful prevention of normal business gains. W. U. Tel. Co. v. Hall, 124 U. S. 444, 455.

The complainants have proved the wrong of the defendant carriers; that that wrong operated to the injury of the complainants and the fact of damage. The testimony of those seven witnesses has proved the fact of damage. That testimony stands without objection or contradiction. The complainants have no additional burden other than to establish the measurement or amount of the damages and rule III (r) of the rules of practice offers them an opportunity to prove the amount of the damages at a further hearing.

The complainants are without power to stop the rebating or to control the resulting infliction of actual pecuniary losses upon them. That power is delegated to the commission in the provisions of section 3 of the Elkins Act. The aggregate of the rebates under consideration, being very large, is an inducement which may prolong the litigation and correspondingly enlarge the losses. The complainants submitted protests against the rebates, to the defendants, in April, 1924. Sullivan, Rec. 299-302. Exhibits 31, 32. If the complainants are permitted to prove the amount of recoverable reparation at a further hearing they will then be able to claim only a small percentage of the losses actually inflicted upon them.

6. Conclusion.

In Alexander King Stone Company v. C. I. & L. Ry., Docket No. 20699, decided by division 6, on December 23, 1929, the commission held the case open for 60 days to enable the complainant to file a petition for further hearing on the question of reparation for violation of section 3. We respectfully request similar permission to act within 60 days following the date of cessation of the rebating condemned in the report of division 3.

A copy of this petition has been mailed to each party of record.

Respectfully submitted,

JAMES GALLAGHER,
NORTHEASTERN WAREHOUSE COMPANY,
WALTER A. BAILEY,
TERMINAL WAREHOUSE COMPANY,
REX & COMPANY, INC.,
INDUSTRIAL COLD STORAGE & WAREHOUSE COMPANY

Petitioners

John J. Hickey,
800 Southern Building,
Washington, D. C.,
Attorney for Petitioners.

Washington, D. C.
February 24, 1930.

Defendants' Exhibit No. 12

BEFORE THE
INTERSTATE COMMERCE COMMISSION

JAMES GALLAGHER, ET AL.

v.

THE PENNSYLVANIA RAILROAD COMPANY

Docket No. 20968

ANSWER OF THE PENNSYLVANIA RAILROAD COMPANY TO THE PETITION OF COMPLAINANTS FOR RECONSIDERATION OF THE FINDINGS OF DIVISION 3 IN RESPECT TO REPARATION, ETC.

Comes now the Pennsylvania Railroad Company, the defendant, in the above entitled proceeding, and files this, its answer to the petition of the complainants for reconsideration of the findings of Division 3 with respect to reparation:

1. The Complainant has not established any right to reparation.

Rule III, paragraph (r) of the Rules of Practice before the Commission provide as follows:—

> "If a general rate adjustment is challenged in the complaint, or many shipments or points of origin and destination are involved, it is the practice of the commission to find and determine in its report the issues as to violation of the act, injury thereby to complainant, and right to reparation, and thereafter to afford the parties opportunity to agree or make proof respecting the shipments and amount of reparation due under its finding before entering its order awarding reparation. (See Rule V.) In such cases freight bills and other exhibits bearing on the details of shipments, and the

amount of reparation on each, need not be produced at the hearing unless called for or needed to develop other pertinent facts."

The complainants contend that they come within the provisions of this rule, and explain their defect of proof on the ground that they were proposing to introduce evidence later as to the amount of their supposed pecuniary loss.

But it will be observed that a later opportunity to introduce evidence as to the amount of damage is only contemplated when three things have been shown at the first hearing:—

(a) Violation of the act,

(b) Injury to complainant, and

(c) Right to reparation.

The complainants' petition for reconsideration may be searched from end to end without disclosing any suggestion that the complainant has established a right to reparation: its whole claim consists of the contention that it has given evidence of pecuniary loss and now desires to have the amount of that loss computed.

But, as the Commission's rule indicates, and as has always been the practice before the Commission, the complainants must establish, not only the fact of damage, but that they are entitled to reparation from the defendant or defendants in the proceeding in which they present their claim. From the beginning, the inherent weakness in the complainants' case has been the entire absence of any adequate proof that the complainants have sustained damages as a result of any infraction of the Interstate Commerce Act by the defendant in this proceeding.

A legal right involves necessarily a legal relation, that is to say, it contemplates that one person is entitled to demand something from another person, either

because such other person has voluntarily assumed a liability or has incurred liability through some default on its part. The fatal defect of the complainants' case is that its evidence as to supposed damage has failed to connect such damage with any one of the three defendants in the three separate cases which, with its consent, were heard upon one record.

In other words, to put it more concretely, there is no evidence whatsoever indicating that any loss which the complainant, James Gallagher, may think he has sustained as a result of his competition with the other warehousemen of Philadelphia, was due to the payments made by The Pennsylvania Railroad Company to the Merchants Warehouse Company. It is entirely consistent with all his evidence and with all the contentions advanced in the complainants' petition for reconsideration that such supposed damage was attributable to the payments made either by the Reading Company or by the Baltimore & Ohio Railroad Company. Now, these three companies are not parties to any joint rate or any other joint act: they are not liable for each other's acts in regard to the matters and things herein complained of; and before the complainant could establish a right to reparation from any one of these railroads, it would have had to prove, with that degree of definiteness which is required in a court of law, that its supposed loss was attributable to the act of the specific defendant against which it brought its case.

If reference is made to the evidence which, in its petition for reconsideration, the complainant picks out as showing the justice of its claim, the defect referred to becomes immediately apparent. This evidence is at pages 11 and 12, and reads as follows:—

> "Q. Have the allowances been used to divert business from the Terminal Warehouse Company to your subsidized competitors?

"A. Yes.'

"Q. Explain that use of the allowances?

"A. There are hundreds of well known concerns that employ warehouses to distribute their products in Eastern cities. We and the subsidized warehouse companies actively compete in soliciting the business of those concerns. Those concerns ship their goods to the warehouse that can offer them the lowest aggregate charge for the distribution of their goods. The aggregate charge is made up of the railroad freight rate to the warehouse and the warehouse charges. Our subsidized competitors are enabled, by the allowances, to quote lower aggregate charges than we can quote and they underbid us and take competitive business away from us."

As will be observed, there is not a word here to indicate that the result referred to was due to the payments made by the Pennsylvania to the Merchants Warehouse. So far as the evidence goes, it might have resulted equally because of the payments made by the Reading or the Baltimore & Ohio. The witness simply refers to what he calls "the subsidized warehouses," lumping them all together. Before he could show a right to damage he would have to show which particular warehouse, by its competition, damaged him in a specific situation, and that such damage resulted from the fact that it had received payment from the defendant.

The evidence falls far short of proving anything of this character. It is also defective in failing to show to what extent, if at all, the supposed damage resulted from payments made on account of intrastate shipments and to what extent from payments made on account of interstate shipments. It also fails to indicate, in any dependable way whatsoever, that the competition of the various warehousemen, as among themselves, would not have created the same level of charges for compensation as actually did exist, and it fails to take

into account the fact that the payments made by The Pennsylvania Railroad Company were made in consideration of sundry services, none of which have been performed by the complainants. On the contrary, they have indicated an unwillingness to undertake the performance of such services (751).

In these circumstances it is obvious that Division 3 was abundantly justified in finding:—

> "Complainants confine the basis of their claim for reparation to damages resulting from shrinkage or diminution of their normal business profits. They urge that they be permitted to submit proof of actual pecuniary loss at a further hearing to be held subsequent to the decision herein, contending that it would be impracticable to make such proof prior to the date the unjust discrimination and undue prejudice is removed. We are not inclined to this view. Complainants have been accorded ample opportunity to present facts supporting an award of reparation. Their case must stand or fall on the facts now of record. The evidence is far too vague and indefinite to warrant the conclusion that complainants have suffered actual pecuniary loss attributable directly to the alleged unlawful practices. Damage must be shown with certainty to support an award of reparation under findings of unjust discrimination or undue prejudice. Penn. R. R. Co. v. International Coal Co., 230 U. S. 184, 206. Reparation is denied."

In their petition for reconsideration the complainants, at page 4, concede that they were required to prove the "fact of damage" at the hearings which have been held, but they omit the other requirement of the rule, viz., the "right to reparation," although, at page 9, in analyzing the decision of the Supreme Court of the United States in Pennsylvania Railroad Company v. International Coal Company, 230 U. S. 184 (1913), they concede that they "must show (1) the wrong of the carrier, (2) that that wrong operated to the injury of

the claimant, (3) the fact of the damage, and, (4) the amount of the damages."

What they have failed to show in this case is that the alleged wrong of the Pennsylvania operated to their injury. They leave wholly uncertain the answer to the question: "Which act of which carrier is supposed to have injured any particular complainant in any specific transaction?"

It is to be remembered that the three cases which are covered by the complainants' petition for reconsideration were heard together without any objection on the part of the complainants. They presented their evidence against all the railroads without differentiating as among them so as to indicate to what extent, if at all, any supposed damage was attributable to any specific railroad. Such procedure was, of course, permissible so far as regards their attack upon the reasonableness of the rule of which they complained, but it does not meet the requirements of the law respecting reparation. It is quite possible that the course pursued by the complainants was so pursued with full recognition of the fact that their evidence went as far as it could go and that they were unable to meet the requirements of complete proof.

2. The complainants' attention was formally directed to the failure of their proof, but they made no effort to supplement their evidence when they should have done so.

In the brief filed on behalf of this Company under date of December 6, 1928, there is the following discussion with respect to reparation:—

> "7. There is no possible basis for reparation.
>
> "The contentions heretofore made show, as this defendant believes, that no infraction of the Interstate Commerce Act or of the Elkins Act has been disclosed in this proceeding. All that has been said, therefore, bears on the claim for reparation and shows it unfounded.

"In addition, it is to be observed that no adequate proof has been submitted showing damage to the complainants.

"(a) In the first place, the payments made to the contract warehouses have been made for sundry services rendered, and there is no evidence tending to show how much, if any, of these payments constitute profit to these warehouses. Now, the complainant warehouses have rendered no similar services to the railroad. Indeed, they do not offer to render similar service in the future; on the contrary, they evince a disinclination to render it (751). If there were any basis for a claim for reparation, it would obviously not be for the net amount of the payments, but only for what might have made by way of profit and if the complainants had rendered to the railroad the same services as the contract warehouses and had received the same compensation.

"(b) There is no adequate evidence tending to show what, if any, proportion of the losses claimed by the complainant warehouses arose in connection with interstate traffic and what in connection with intrastate traffic. Both classes of shipments are involved (52, 102, 144, 214, 224, 226, 332).

"(c) Since all three railroads serving Philadelphia had arrangements of the kind complained of with the contract warehouses, a particular complainant would have to show which arrangement operated to its disadvantage in order to secure an award of damage. There is nothing in the record tending to show that any disadvantage sustained by any particular complainant was attributable to the arrangement set up by any defendant with any particular warehouse.

"(d) The warehouses which are not under contract have been in competition with each other and there is nothing to show that the extent to which they have failed to charge fees which otherwise they might have charged is not due to the

competition with one another rather than to the competition with the contract warehouses.

"(e) The evidence is far too vague and indefinite to justify any conclusion of any damage resulting to the complainants from any particular payment made by any particular railroad to any particular contract warehouse."

The Examiner's proposed report, promulgated under date of June 20, 1929, recommended the following finding:—

"Complainants confine the basis of their claim for reparation to damages resulting from shrinkage or diminution of their normal business profits. The evidence of record is far too vague and indefinite to warrant the conclusion that complainants have suffered actual pecuniary loss attributable to defendants' alleged unlawful practices. Damage must be shown with certainty to support an award of reparation under findings of unjust discrimination or undue prejudice. Reparation should be denied."

And yet, while the complainants took exception to this finding and replied to the exceptions on behalf of the defendant, they did not in any way meet the contentions advanced in the original brief of this defendant as above set forth. Furthermore, although advised in this formal fashion of the defect of their proof, no request was made by the complainants for further hearing, but the matter was allowed to proceed to argument and disposition by Division 3 of the Commission. Indeed, at various stages the complainants have admitted substantial defects in their proof as to reparation.

3. Admissions of complainants as to defective proof.

At page 66 of their original brief, the complainants said:—

"We will confine our claim for reparation to that one of the three classes of damage mentioned above, that is, to shrinkage or diminution of normal business profits. The damages of the two other classes, inflicted upon the complainants, and the damages that will continue after they obtain relief from the unfair competition with concerns built up by means of the rebates undoubtedly are many times greater than the damages computed on shrinkage of normal business profits during two years. But those other classes of damages are of a speculative character."

As will be observed, the complainants specifically concede the speculative character of certain of the classes of damage which they claimed had resulted from what they contended were illegal acts on the part of the defendants in the several cases, and they formally waived any claim on any such basis.

It is believed that the damages, even on the basis which was still asserted, are also speculative; but, passing this question, the Commission's attention is respectfully asked the following excerpt from the transcript of the oral argument of counsel for the complainants (892-892½):—

"The Examiner in his proposed report recommends a finding of violation of Section 2 and violation of Section 3. I think it is a splendid report. The only exception we take to the report, or the principal exception, is that the Examiner recommends that reparation be denied because we have not proved actual pecuniary loss. I think the Examiner is correct, in that we have not satisfactorily proved actual pecuniary loss; and I ask for a further hearing to afford us an opportunity to prove that in support of our claim for reparation.

"COMMISSIONER AITCHISON:—Why didn't you prove it when you had a chance?

"MR. HICKEY:—It was impossible, Mr. Commissioner. You see, this is not like reparation for violation of Section 1. This is reparation for violation of Section 2, where we are obliged to prove actual pecuniary loss. We cannot prove that until you stop this rebating by your order. You see, the loss accrues every day that these rebating arrangements are in force."

While there is an effort to excuse the failure of evidence, there is a plain admission of the defect in proof. And even the excuse offered does not cover the period prior to the hearing or cover the failure to prove that the complainants' alleged loss was due to any act of any specific defendant.

4. Allegations with respect to reparation subsequent to August 1, 1928.

In their petition for reconsideration, the complainants argue that in any event they should have a hearing with respect to reparation supposed to have been suffered after August 1, 1928, because of the fact that the initial hearing in the case, was held on or about that date. However, this suggestion overlooks the fact that there was a later hearing on October 8th, 9th and 10th, 1928, at which the complainants made no effort to perfect their case, and that in any event, in accord with the Commission's practice, there ought to be evidence of a right to reparation from a defendant prior to the date of hearing if the petitioner seeks to establish any such claim during the pendency of the proceeding.

But this theory of the complainants seems inconsistent with the following statement found at page 6 of their petition for reconsideration:—

"It follows that the formal complaints as filed cover only losses and reparation that accrued prior to the date on which the complaints were

filed. Rule III (q) of the rules of practice, which applies to reparation for violation of section 1, evidently adds no force to the complaints in the cases at bar and, therefore, the complainants must file supplementary complaints covering the period subsequent to April 28, 1928. Further hearing cannot be avoided unless the complainants abandon a large part of their lawful claims for reparation or are denied their statutory right to prosecute those claims."

In view of this contention of the complainants, it is difficult to understand the argument which they advance under the caption which is designated "1" on page 3.

5. Conclusion.

The complainants throughout this proceeding have sought to strength their position by somewhat severe denunciation of the defendant, but it should be remembered that the Commission's second decision in the case of the McCormick Warehouse Company v. The Pennsylvania Railroad Company, 148 I. C. C. 299 (1928), constituted a departure from several previous decisions of the Commission which had recognized the legality of such an arrangement as is here presented to the Commission, and that the prior decisions had interpreted the arrangement as creating an agency on the part of the warehouse for the railroad.

The Commission's attention is asked to Keystone Warehouse Company v. P. R. R. Co., et al., 53 I. C. C. 335 (1919); Keystone Elevator & Warehouse Co. v. Director General, et al., 73 I. C. C. 273 (1922), particularly at page 274; McCormick Warehouse Co. v. P. R. R. Co., 95 I. C. C. 301 (1925). In view of the fact that the Commission, in three formal cases, had recognized the substance of the relation as what the railroad claimed it to be, it must be conceded that the denunciations of the complainants are without justifi-

cation. Certainly in such a situation a change of practice should not involve reparation even if the complainants' proof rose to a higher standard than that which it has reached.

It should also be noted that no reparation was sought in the McCormick case; and, of course, none was awarded.

But in any event, the proof is totally inadequate to show what is necessary under Rule 3 (r) before the Commission can make a finding that the complainant is entitled to reparation and thereby prepare the way for a later proceeding for the assessment of damages. And, as indicated above, the complainants' counsel has himself conceded a substantial measure of the defect of proof.

It is respectfully submitted that the petition for reconsideration should be denied.

HENRY WOLF BIKLE
Counsel.

9 March, 1930

ORDER

General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 1st day of June, A. D. 1931.

No. 20968

JAMES GALLAGHER, ET AL.

v.

THE PENNSYLVANIA RAILROAD COMPANY

No. 20968 (Sub-No. 1).

WALTER A. BAILEY, ET AL.

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY

No. 20968 (Sub-No. 2)

REX & COMPANY, INC., ET AL.

v.

READING COMPANY

Upon consideration of the petition of complainants for reconsideration of the conclusions of Division 3, in respect of reparation, by the entire Commission, and for further hearing to enable complainants to prove the amounts of reparation claimed, and of answers thereto; and upon further consideration of the record in the above-entitled proceedings:

It is ordered, That the said petition be, and it is hereby, denied.

By the Commission.

GEORGE B. McGINTY,
Secretary.

(SEAL)

BEFORE THE
INTERSTATE COMMERCE COMMISSION

DOCKET NO. 23790

FILED AUG. 23, 1930

JAMES GALLAGHER
NORTHEASTERN WAREHOUSE COMPANY
WALTER A. BAILEY
TERMINAL WAREHOUSE COMPANY,
COMPLAINANTS,

VS.

THE PENNSYLVANIA RAILROAD COMPANY,
DEFENDANT.

COMPLAINT

This complaint of the above-named complainants respectfully shows:

I.

(a) That on April 26, 1928, the said complainants filed their formal complaint with the commission and that that complaint was docketed under the number 20968; that after public hearing on that complaint the commission, division 3, on December 28, 1929, 160 I. C. C. 563, issued its report and order and therein found that the defendant carrier had violated sections 2 and 3 of the Interstate Commerce Act; that in that report division 3 denied reparation and further hearing on reparation to the complainants; and that by their petition of February 26, 1930, the complainants seek further hearing in the matter of reparation.

(b) That operation of said order of the commission is temporarily stayed and suspended by order of

the District Court of the United States, Eastern District of Pennsylvania (Judges Buffington, Thompson and Dickinson,) of April 15, 1930, and said order is thereby suspended until the further order of said court.

(c) That the said complainants, for the purpose of protecting their claims for reparation from being barred by the statute of limitations and for the purpose of establishing their statutory rights to recover reparation for damages suffered at the hands of the defendant carrier, as alleged herein, now file this formal complaint.

(d) That the complainants file this complaint in compliance with the letter of the commission's Secretary addressed to complainants' attorney, under date of May 20, 1930, in which the commission required the filing of a new complaint in lieu of the supplemental complaint which was filed by the complainants on April 23, 1930.

II.

(a) That during the period of time from April 25, 1928, to the date of the filing of this complaint James Gallagher, complainant herein, trading and doing business under the name and style "Gallagher's Warehouses", had a general office at No. 50 South Third Street in the City of Philadelphia in the State of Pennsylvania and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia in carrying on his said warehouse business.

(b) That at said times the Northeastern Warehouse Company, complainant herein, was a corporation organized and existing under the laws of said Pennsylvania; had a general office at Sedgely and Erie

Avenues in said Philadelphia and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia in carrying on its said warehouse business.

(c) That at said times Walter A. Bailey, complainant herein, trading and doing business under the name and style "Bailey Warehouses", had a general office at Delaware Avenue and South Street in said Philadelphia and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia in carrying on his said warehouse business.

(d) That at said times the Terminal Warehouse Company, complainant herein, was a corporation organized and existing under the laws of said Pennsylvania; had a general office at Delaware and Fairmount Avenues in said Philadelphia and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia in carrying on its said warehouse business.

III.

That at said times the Pennsylvania Railroad Company, the defendant, was a corporation organized under the laws of Pennsylvania and was a common carrier engaged in the transportation of property wholly by railroad, for hire, between said Philadelphia, a point on its railway route, and various points outside the State of Pennsylvania, and, as such common carrier, was subject to the provisions of the Interstate Commerce Act.

IV.

(a) That at said times the Merchants Warehouse Company, Inc. was a corporation organized under the laws of said Pennsylvania; had a general office at No. 10 Chestnut Street in said Philadelphia and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia and competed with each of the complainants in carrying on its said warehouse business.

(b) That at said times The Quaker City Cold Storage Company, Inc., was a corporation organized and existing under the laws of Pennsylvania; had a general office at No. 211 Callowhill Street in said Philadelphia; occupied and used warehouses and warehouse facilities in said Philadelphia; conducted a warehouse business at said Philadelphia and in the conduct of that business competed with complainants.

(c) That, for convenience, said Merchants Warehouse Company and said Quaker City Cold Storage Company, Inc. collectively are referred to herein as the subsidized warehouse companies.

V.

(a) That during the period of time from April 25, 1928, to the date of the filing of this complaint, herein called the period of two years, each of the complainants and said subsidized warehouse companies in the conduct of his or its warehouse business, shipped numerous carloads, and smaller lots of property outbound from their warehouses in said Philadelphia to various points outside the state of Pennsylvania and tendered said property to defendant for transportation.

(b) That during said period of two years each of the complainants and said subsidized warehouse companies, in the conduct of his or its warehouse business, caused numerous carloads, and smaller lots, of property to be shipped from various points outside the State of Pennsylvania to said Philadelphia and to be delivered to them by the defendant at their warehouses in said Philadelphia.

(c) That during said period the defendant and its connecting lines transported said property, for hire, in interstate commerce between said warehouses in Philadelphia and said points outside the state of Pennsylvania.

(d) That said property which defendant transported for complainants was similar to the property which defendant transported for said subsidized warehouse companies and the defendant performed said transportation service contemporaneously and under substantially similar circumstances and conditions.

VI.

(a) That at various times during said period of two years the defendant gave allowances of 50 cents per ton and of other amounts per ton to said subsidized warehouse companies out of its published freight rates for said transportation of said property to and from warehouses of said subsidized warehouse companies.

(b) That certain of said allowances are referred to in defendant's published tariff bearing the number G. O. ICC No. 14400.

VII.

(a) That at the times the defendant transported the property as alleged in Paragraph V above, the defendant charged, collected and received its filed and

published rates applicable to said transportation service and, later, at various times, the defendant, by the means of the allowances, special rates, rebates, drawbacks and concessions, as alleged in Paragraph VI above, which were devices used for the purpose of facilitating violations of sections 2 and 3 of the Interstate Commerce Act, refunded and remitted to said subsidized warehouse companies part of the defendant's said filed and published rates which were lawfully applicable to said transportation of property performed by defendant for said subsidized warehouse companies.

(b) That through and by the means of said devices the defendant transported said property for said subsidized warehouse companies at net rates which were materially less than its filed and published rates which is charged and collected for similar transportation of property for complainants.

VIII.

That by reason of the facts stated in the foregoing paragraphs complainants have been subjected to the payment of rates and charges for transportation which were, when exacted, and still are unjustly discriminatory in violation of section 2 of said act, and, unduly preferential of said subsidized warehouse companies, competitors of complainants, and unduly prejudicial to complainants in violation of section 3 of said act. That each of the complainants has been injured thereby to his or its damage in a large sum of money.

IX.

Wherefore complainants pray that defendant may be required to answer the charges herein; that after due hearing and investigation the commission find that

said act has been violated as stated in Paragraph VIII above and that an order be made commanding said defendant to pay to each of complainants by way of reparation for said damage, and, for additional damage arising from similar unlawful conduct of defendant during the prosecution of this case, such sum of money as, in view of the evidence to be adduced herein, the Commission shall determine that each of the complainants is entitled to as an award of damages with interest, under the provisions of said Act for violation thereof and that such other and further order or orders to be made as the Commission may consider proper in the premises.

JAMES GALLAGHER
NORTHEASTERN WAREHOUSE COMPANY
WALTER A. BAILEY
TERMINAL WAREHOUSE COMPANY,
Complainants.

By John J. Hickey
800 Southern Building,
Washington, D. C.
Attorney for Complainants

Dated at Washington, D. C.
August 23, 1930.

Before the
INTERSTATE COMMERCE COMMISSION

James Gallagher, et al.

v.

The Pennsylvania Railroad Company

Docket No. 23790

Filed October 1, 1930.

DEFENDANT'S ANSWER.

The defendant, for answer to the Complaint filed in this proceeding, respectfully states:

I. For answer to the averments of Paragraph I.(a) of the Complaint, leave is craved, for greater certainty, to refer to the records of the Commission. The averments of Paragraph I (b) of the Complaint are admitted. The averments of Paragraph I (c) require no answer. Defendant is without information as to the averments of Paragraph I (d), and therefore answers that this complaint was filed, according to the stamp of the Commission, on August 23, 1930.

II. The defendant is without information as to the averments of Paragraph II of the Complaint, and asks, therefore, that due proof be furnished by complainants, in so far as it be deemed material.

III. For answer to the averments of Paragraph III of the Complaint, the defendant admits that it is a common carrier, engaged, in part, in interstate commerce, and that, as to such commerce, it is subject to the Act to Regulate Commerce, approved February 4,

1887, and the Acts amendatory thereof and supplementary thereto, in so far as the same are constitutional and enforceable.

IV. The defendant is without information as to the averments of Paragraph IV of the Complaint, and asks that due proof be furnished by complainants, in so far as it be deemed material.

V. In the time allowed for the filing of this answer, and especially in view of the fact that no reference is made to specific shipments, the defendant has been unable to obtain sufficient information either to affirm or deny the averments of Paragraph V of the Complaint, and asks that due proof be furnished by complainants, in so far as it be deemed material.

VI. For answer to the averments of Paragraph VI of the complaint, leave is craved, for greater certainty, to refer to tariffs and classifications lawfully on file with the Interstate Commerce Commission.

VII. The averments of Paragraphs VII, VIII and IX of the Complaint are denied.

WHEREFORE, the defendant prays that the Complaint filed in this proceeding be dismissed.

THE PENNSYLVANIA RAILROAD COMPANY

By V. P. SUMERFIELD
Asst. Freight Traffic Manager

WINDSOR F. COUSINS,
HENRY WOLF BIKLE,
Of Counsel.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 9th day of May, A. D. 1932

No. 23790

JAMES GALLAGHER, ET AL.

v.

THE PENNSYLVANIA RAILROAD COMPANY

No. 23790 (Sub-No. 1)

WALTER A. BAILEY, ET AL.
THE BALTIMORE AND OHIO RAILROAD COMPANY

No. 23790 (Sub-No. 2)

REX & COMPANY, INCORPORATED, ET AL.

v.

READING COMPANY

It appearing that the complaints in the above-entitled cases have been held in abeyance pending final disposition of Docket No. 20968, Gallagher v. Pennsylvania R. R. Co., 160 I. C. C. 563; that complainants' petition for reopening of the latter proceeding was denied by order of the Commission dated June 1, 1931; and good cause appearing therefor:

It is ordered, that the complaints in the above-entitled proceedings be, and they are hereby dismissed.

By the Commission.

(SEAL) GEORGE B. McGINTY,
Secretary.

DEFENDANTS' EXHIBIT NO. 13.

(By agreement of counsel, Defendants' Exhibit No. 13, consisting of a certain supplemental agreement dated August 2, 1926, between the Baltimore and Ohio Railroad and Pennsylvania Warehousing and Safe Deposit Company, is not reprinted here because the said agreement is printed in full in the narrative transcript of the testimony at pages 211 and ff, supra.) (Pages 387 to 394 of Record.)

CHARGE OF THE COURT—HON. OLIVER B. DICKINSON, J.

Members of the jury: I can't repress the impulse to give expression to a commendation in which I am sure you-all want to have a part, and that is of the conduct of counsel in the presentation of the case and the defense to you. Often, too often, indeed, the thoughts and attention of the jury and of the trial Court are distracted from the merits of the case by the bickerings of uncandid and angry advocates. We are all gratified to know that there has been nothing of that kind in this case. The case has been tried with the ability which would be expected of counsel who are engaged on the respective sides. In addition to that, and, indeed, more important than that, the case has been tried with an attitude of fairness and consideration for each other so that we have escaped all the ordinary wranglings among counsel.

The plaintiff is presenting a claim to you in which you have a right to infer that they are sincerely complaining of what they think to be a loss to them. The defense, on the other hand, has that same feeling that they are right in presenting their defense to this claim.

Some one must decide between them, and you are that some one. I know that every one of you has the feeling, the disposition and the impulse to do the fair thing between these litigants. That is what every one of you wishes to do—to render a just verdict in this case.

Let me point out to you that if the verdict which you render is an unintelligent, an ill-considered, a wrong verdict, the fact that you had no intentions of doing injustice to either side would not make that wrong verdict a just verdict in any real sense of the term. If you are to render a just verdict, you are not only to render a well-intentioned verdict, but a well-

considered and an intelligent verdict. To do that, you must understand what the questions are which you are asked to decide. Let's see if we can get that clear in our own minds.

Many cases which are presented when they are given to us in the lump, en mass, seem to be, and are very complex and difficult for us to understand; it is difficult for us to recognize on which side the right and justice of the case is. However, if you take up the whole fact situation that is presented to you, whatever its complexity, and you take the time and have the patience to subject that to an intelligent analysis, you will find that out of that complexity there arises often only one, and never more than a few simple questions of fact which you are to determine.

When I say "simple questions of fact", I by no means wish to be understood as meaning they are questions that are easily answered. These questions may be difficult to answer, but I mean that you can get into your grasp an idea of the simple questions which are presented to you and you can understand the questions, and you can understand what it is that you are expected to do.

Let's see if we can resolve this case into its simple questions by an analysis of it. I think you will find that it resolves itself into the answers to three questions, no one of which you will have any difficulty in understanding as questions, whatever difficulties you may have in finding the right and proper answer to them.

What is the fact situation here? You may go back to the time before the organization of the so-called public warehouses and consider the situation as it then was. Every man who was a manufacturer on a large scale, or a trader in large volume had his own warehouse, usually adjacent to the railroad so that he could have the cars shipped to him, unloaded, and have the

contents put into the warehouse for safe keeping until he had use for them. Or, he might have his warehouse adjacent to his manufactory or his place of business, and he trucked the freight from the car to his warehouse, and it was there stored until he had occasion to use it.

Now, there is another thing: We all know that differences are made between what are sometimes called wholesale prices and retail prices. That difference is considered reasonable and fair, and almost universally prevails—indeed, I might say universally prevails.

The same thing exists in respect to railroad traffic. A man who can ship in carload lots gets a better rate than a man who ships in less than carload lots and, you can see, for a very obvious reason. That gives a man who deals on a large scale a very great advantage over the small dealer.

Some one conceived the idea some forty odd years ago that he could remedy that situation by establishing what have been known in this trial as public warehouses; he would organize a warehouse company, and that company could collect the shipments from a number of small shippers, or shippers in smaller volume to make up a carload lot, and then have that whole carload shipped to the warehouse or in care of the warehouse company, and then, after it arrived there and had been unloaded and placed in that warehouse, he would distribute it among the different shippers. In that way the small shipper would get the benefit of the carload lot rates, and it would be a great advantage to him. This business of public warehouses has increased and so far supplanted the old methods that, as I understand it, there are no longer any private warehouses in the Philadelphia district. They have been abandoned because the public ware-

house answers all their purposes, and it is more convenient to do business in the new way than in the old way.

You see that under this arrangement the railroads, the carriers, as we call them, became interested for a very obvious reason. As the warehouse was in effect a real shipper they were in a position to name the railroad in many instances over which the freight should be carried. For that reason, each railroad, anxious, as it had a perfect right to be, to secure as much of the freight traffic as each could secure, became interested in this question of the shipments.

Out of that grew the suggestion, again, I think, something like forty or more years ago—forty-seven years ago—of an agreement at that time between at least one of the railroads and one of the warehouses. That agreement was that the railroad company would constitute that warehouseman—in this case, the Merchants Warehouse Company—the freight agent of the railroad company, and it would designate the warehouse of the Merchants Company as the freight office or station of the railroad company, so that what the warehouseman did, he would do in one or the other of two capacities; a great part of his service he would do as the agent of the carrier and on behalf of the railroad company, and the other part of it he would do in his capacity as an ordinary warehouseman.

The advantage to the railroad company, of course, was the expectation that the warehouse which it had thus designated as agent of the railroad company would use its influence to have diverted to the Pennsylvania Railroad the freight shipments which could conveniently be so carried; in other words, the railroad was compensated by getting more traffic than it would have otherwise expected to get. You can see that very clearly. Because of that, and because of the rendering of the services, real or nominal as they

may have been, for the railroad company, the railroad undertook to pay, in this case, the Merchants Warehouse Company, a sum of money for the services thus rendered, precisely as they would have paid any other agent or employee of the railroad company. The aggregate of those payments has run into a quite substantial sum; I might not have carried it in my mind correctly, but if I have, it is something like $663,000 in the aggregate.

That agreement, bear in mind, was made a great number of years ago. It was renewed from time to time, and changes were made in the compensation. At one time it was on the basis of thirty-five cents for some unit, and later it was increased to fifty cents, but substantially the same arrangement persisted. In the meantime, other public warehouse companies sprung up; among the rest, the Terminal Warehouse Company, the Plaintiff in this case.

Of course, every other warehouse company would feel itself at a disadvantage because of the arrangement made between the Pennsylvania Railroad, the principal carrier in this district, or, at least, carrying a very large proportion of the freights that were carried, the Merchants Warehouse Company having been constituted the agent of the Pennsylvania Railroad and being paid this compensation for services. They would all feel that they were placed at a great disadvantage whether they were justified in the feeling or whether they were not, because that is human nature. Any of us who have competitors and rivals in business will resent the thought that that rival and that competitor gets what might be called an artificial advantage over us in the strife for business. That is human nature, and would be true of you or me, or any one else similarly situated. What is of advantage to one, however, as I will point out later, may be no loss or disadvantage to another.

Now, there is another thing: These goods were shipped under an arrangement which I assume is universal because it is in effect everywhere. The railroad company supplies the car. That car is filled with your products, your goods, or your raw materials, as the case may be, to be shipped to you. The expectation is that you will promptly unload that car, and if you do not and that car is detained for an undue time, the railroad loses the use of that car, and that is a great loss and disadvantage to them. Because of that, and in order to stimulate your efforts to unload that car promptly, you are given a short period of what is called "free time" in which to unload it, and if you do not unload it in that time and the car is detained and the railroad company deprived of its use, you are called upon to pay what is called "demurrage", which is familiar to all of you, and which is a very important item, many times, in traffic of this sort.

Those outside of this arrangement felt that they were under another disadvantage because they could not give to their customers the right to unload after the free time had expired without the obligation of paying demurrage, but the complaint was that the agent of the railroad company was in a position to relieve them of that demurrage charge, and thereby get another very great advantage over other shippers. You can, of course, all readily understand that that would be a great advantage.

The contracts between the Merchants Company and the Pennsylvania Railroad Company by which these advantages to which I have referred were given to the Merchants Company—or what, at least, every competitive warehouseman would consider would be an advantage to them—has figured very largely in this case, and very much has been said about the lawfulness and unlawfulness of those contracts.

I want to say to you, and I want you to give attention to this statement as the law of the case, that we have nothing whatever to do with that contract. We don't care whether it was lawful or unlawful; whether it existed, indeed, or whether it didn't exist in itself. We are only concerned with it because of the light, if any, it may thrown upon another question to which I will ask you to give your attention in a moment.

I will refer to the contract as one; there are a number of them, but they were virtually renewals of the same contract. This contract, as I have said, was in force for a number of years.

There were other railroad companies who subsequently made the same kind of an arrangement, and in passing I want to point out this to you, that I don't see that we are concerned with the question of whether other railroads did a like thing, or whether they did not. If it was proper for the contract to be made, any railroad might enter into similar contracts. If it was improper and an unlawful thing, then, of course, you will see at once [redacted] Pennsylvania Railroad is not excused from any responsibility or liability which may arise to them because of the fact that some other railroads had incurred the same liability. I am sure that will have so strongly appealed to your common sense that it will not be necessary for me to revert to it again.

Now, there was doubt as to the propriety of this contract; nobody can shut his eyes to that. For a number of years there may have been complaints in the sense of growing complaints by other warehouse companies, but it went on for years before any opportunity for them to successfully attack it arose. After a while, we had passed a law with which you are all familiar, known as the Interstate Commission Law, or, as it is commonly called in these alphabetical days,

the I. C. C.: Interstate Commerce Commission. That Commission was given the power to intercede between the public carriers, railroads and others, and the shippers, in order to see that the arrangement made by the railroad companies or other carriers and the charges made by them for carrying freight were what they should be, and the Interstate Commerce Commission was empowered to make that inquiry.

They were applied to and asked to determine the merits of this contract to which I have alluded, and they decided that that contract was unfair, improper, illegal; and they issued what is called a "desist order", and that is that the carriers were to stop granting the privileges called for by that contract, and as soon as that was finally decided, the railroad companies cheerfully acquiesced in it, and since then the contract has not been in force, or acted upon.

Anybody interested has the right to call in question the propriety of the judgment of that Commission by an appeal to the Court. If a constitutional question is involved, as, indeed, very often usually there is, that appeal, if we call it such, is heard not by the ordinary courts as constituted,—the district courts, for instance, with a single judge sitting—but by a special court, or what lawyers called a "statutory court" composed of three judges, one of whom must be a member of the Circuit Court of Appeals. When the District Judge is applied to in a case of this kind, it is made his duty to call to his assistance—he is powerless to decide the question alone—two other Judges, one of whom must be a member, as I have just said, of the Circuit Court of Appeals. That Court, constituted of the three Judges, hears the appeal.

This order was taken in due course before that kind of a Court, and that Court ruled on it. Again it is evident that the question was not free from doubt, because one of the members of that Court, one of the

three—and I may say in passing, one of the most experienced and distinguished of American jurists—was of the opinion that there was nothing unlawful about this arrangement and was in favor of reversing the order of the Commission requiring the railroads to desist from it. The railroads at least technically were not interested in that question, and the litigation was carried on by the warehouses themselves.

An appeal was taken from that Court to the Supreme Court of the United States which has full authority, as you all know, to determine all litigated questions that are in controversy, and that Court affirmed the judgment of this three-Judge Court; in other words, decided that this agreement was unlawful, improper and that the order of the Commission requiring the railroads to desist from granting the privileges accorded by that agreement was a proper order to have issued, and confirmed, affirmed and approved that order, so we know now that that agreement was not a lawful agreement to have been made.

But let me call your attention to what I have said before: I don't see that we are concerned in the least with whether it was lawful or not lawful except that it became an instrumentality, an element in another complaint which the Plaintiff in this case along with, possibly, other warehousemen made against the railroad company.

What is that complaint? That was not, let me repeat, whether this contract was lawful or unlawful, but the complaint was that it was used as an instrument, as a means of bringing about what is called "restraint of trade", or in creating what we call a "monopoly".

You will want to know what is restraint of trade. That phrase "restraint of trade", originally, so far as I know, applied only to the act of the individual

trader. You can understand that a man might agree that he would not engage in a particular trade, or so far as that is concerned, in any trade. An agreement of that kind is in restraint of trade.

Let me say to you, incidentally, when I talk to you of restraint of trade, and monopoly of commerce or of trade, that what I say is directed to what we all know as interstate commerce. That is, commerce, which in the carrying of it on, crosses a state line; originates in one state and terminates in another.

I have been asked to say to you that there is no evidence of interstate commerce in this case. I decline to say that to you. There is evidence in this case from which you may find that the business with which we are here concerned, the trade with which we are here concerned, the commerce with which we are here concerned, was in some measure, and, indeed, in large measure, interstate commerce. Therefore, the laws to which I will call your attention in a moment have application to it.

There are a great many ideas which, when conveyed to us in what is commonly called the abstract, or the lump, or en mass, we see or think we see pretty clearly what the idea is, and we grasp it, but when we come to take a closer view and get a nearer view of that same idea, all the meaning it has is so illusive that it seems to slip through our fingers, and we lose our grasp on it.

I have often illustrated that to my own mind to clarify my own ideas, and it may be some help to you, by the figure of a cloud on the mountainside.

Here is a man in the valley looking up at that cloud; it is a well-defined thing; its boundaries are just as distinct and clear as the boundary limits of a tree, or a rock, or a building, or any other structure. But if that same man begins to climb that mountain and gets up to the locality in which that cloud is, he all at once

finds that the thing that was before so definite and clear to him has neither beginning nor end, and he can't tell when he enters it or when he leaves it.

A great many of these ideas that are given to us are precisely of that same character. This idea of restraint of trade and monopoly are now recognized evils by, I suppose, every one, and when we hear them denounced as wrong, we all think that we have a pretty clear idea of what they mean, but when you come to apply those, as you think, definite ideas to the particular phases in concrete application, you discover that that idea that you thought was clear and definite is nothing like as definite as you thought it was.

Take this idea of restraint of trade: Every one of us would think he knows exactly what was meant by that, and would give a definite and clear-cut meaning to it.

Here is a man who is in business; you buy him out and he agrees that he will not engage in any business, or in that business at any time in the future. That is a contract clearly in restraint of trade because it takes that man's activities out of the realm of trade. A contract of that kind would be recognized as an unlawful contract in the first place, but when you bought that business of that man, you bought along with the fixtures and the stock and the other things about it—perhaps the real estate on which it was conducted—the good-will of that business, and that was a very important element in your purchase. If that man immediately after he sold out to you all his business and his good-will would set up a competitive business or trade right next door to you, you would feel that he had done you a great injustice and had not performed his contract with you.

Therefore, this idea of restraint of trade came to be modified, and if instead of the man agreeing that he would not engage in trade at all, or would not engage

in that particular trade at any time, he would agree with you that he would not set up a competitive business on that same street within that same block, or in that same neighborhood, or that he would not set it up for a limited number of years, then that agreement, although it is still in restraint of trade—I don't see how anybody can get away from that thought—is not considered as an unreasonable or an undue restraint of trade. It is perfectly fair and reasonable and proper that you, having bought the goodwill of that man's business, should be permitted to get all you bought, and you would not get it unless he restricted his trade activities thereafter.

You see that there comes into this idea of restraint of trade the thought of whether or not the restraint is unreasonable and undue; if it is, it is unlawful. But if it is reasonable and fair, and in that sense proper, it is not unlawful.

I am sure you are all in a general way familiar with what is called the Sherman Anti-Trust Law. We all know the history of that law and what led to its passing. I will read to you that law because it is very short, and will give you as clear an idea as I can of what one of the questions is that you are to determine. The first section of that act provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations is declared to be illegal."

You see how broad that is. One of the words which it uses is the word "conspiracy," and I may say a word about what a conspiracy is. When you hear the word "conspiracy," it conveys to your mind and does to all our minds an idea of the element of evil; there is that thought in it; it is an evil thing—conspiracy.

Originally that word had no such meaning as that at all, necessarily. It would include evil things, but didn't necessarily include them. You take, for illustration, what we call its etymological meaning; the word "conspire" is derived from the Latin language, two Latin words; one of them the word "con," which in our language means together, and the other "spiro," which means to breathe, so that a conspiracy is, etymologically, at least, a mere breathing together, and conveys the idea, don't you see, of concert of action; what is called in athletics teamwork as distinguished from individual activity; the people are acting in concert, acting together; having combined; are breathing the same spirit; have the same objective in view or, in other words, are acting together in that sense. That is really all that a conspiracy means; that instead of the parties to it each playing off his own bat and acting on his own initiative, the two have combined their efforts so as to give the effect of, as I have said, teamwork.

The second section of that act is again very short and I will read it to you. Bear in mind the first section relates to restraint of trade. The second section is this:

"Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person to monopolize any part of the trade or commerce among the several states or with foreign nations" is doing what the law denounces to be an unlawful thing.

Now, there you get the idea that suggests the first question in this case, and lies right at the threshold of your deliberations. This suit is founded on that act and is based upon it, so that you see the first thing you are to decide is whether or not there existed a conspiracy, or a combination, or an acting in agreement, or an acting together—it all means the same thing—be-

tween these two defendants to do either or both the things that are condemned by this law to be wrong.

I have discussed the question of restraint of trade and its limitations. The same thing applies to a monopoly.

Here is a man who is in business; he has struck what is called a good thing; he is very successful; that business is very profitable to him; he has no competitor; nobody has ever engaged in that same business to compete with him. Another man, knowing that that man is doing well in that business, conceives the idea that he will go into the same business. Will anybody say that he hasn't a perfect right to do it? If we are to have freedom, he must have that right or privilege of engaging in any business in which he sees fit to engage, whether other people are engaged in it or not.

If he does go into it, he strives to get what he would call his share of this business, but if he is like most of us he would consider his share all of that business, provided he can get it all. The extent to which he succeeds in getting any part or the whole of that trade, to that extent he is monopolizing, isn't he? He is restraining other people from getting what he has already obtained, and you have a restraint or a monopoly.

How does he get it? He may get it by providing what has been called efficient service. You have heard a great deal about that in this case. He may do it by his activity and his energy in his business, and his faithfulness and his loyalty to those with whom he does business. He may do that work very much more satisfactorily to his patrons than it was done before, and in that way he may succeed in getting a very large part—or, for that matter, so far as I can see, the whole of that trade, and may take it away from anybody else.

You will recall that Emerson has made that thought very familiar to us in that famous phrase of his that if there is a blacksmith who can make a better

horseshoe than his competitor, although he may set up his forge in a wilderness, the world will wear a pathway to his door, meaning to convey the idea that good service and efficiency will have the reward of attracting to it the patronage of those who would have occasion to do business with him.

That man is doing nothing wrong, but in order to accomplish his purpose he may call in the assistance of somebody else, a banker who can supply him with an unlimited capital, a railroad company that can give him favors in the way of preferential rates and accommodations in the shipments of raw materials to him, and his product by him, and they may get together and devise means or methods, and resort to practices which are what are commonly called unfair, oppressive to others to drive those others out of business, to unfairly interfere with the people with whom he has been doing business, to seek to stir up opposition, to induce people by tales that are untrue and false and misleading to withdraw their patronage from the men to whom they have been giving their business and to give it to the conspirators, because that is what they would be; they would be conspirators within the meaning of this law.

That is, as I have said, the first question which confronts you in this case. You must decide under all the evidence, of which these contracts are part, but not basing it on the contracts except as they may have been an instrument, whether or not these defendants were engaged in that unlawful conspiracy.

I will give you just a word of what the Supreme Court has said upon this subject, referring to this Anti-Trust Act, that "it should be construed in the light of reason". As so construed, it prohibits all contracts and combinations which amount to an unreasonable or an undue restraint of trade in interstate commerce; or, we may add, to create a monopoly. There is just the distinction which you have to draw in this case.

The complaint is on the one side that this was an unreasonable, in the sense of unfair, unjust, improper and unlawful combination for an unlawful purpose; and upon the other side, that whatever the two defendants did in this case, they were doing nothing unreasonable, or undue, or unfair, but only that which every man in business has a perfect right to do. That is the first question in the case.

Now, let me read you another section of this Act; it is again very short so that I need not apologize for calling your attention to it:

"Any person who shall be injured in his business or property by reason of anything forbidden in the Anti-Trust Laws"—those are the two things that I have read to you—"may sue therefor in any District Court of the United States in which the defendant resides or it is found," and so forth; "any person who is injured in his business or property."

You can understand there may be in existence an undue, an unlawful, and an unreasonable restraint of trade. There may be those in that business who have conspired together in order to acquire a monopoly in that unlawful sense of that trade, and yet neither you nor I, if unaffected by it, would have any right to bring suit for damages. But if it affected us, or if it affected any one in his business or property, then he is given the right under this law to bring suit. This is precisely what is being done in this case by the plaintiff, and that makes the second question: Has this plaintiff suffered any loss in its business or property by reason of any unlawful combination?

Let me say this: The burden is upon the plaintiff to convince you by the evidence in the case; if you have not been convinced that any such unlawful conspiracy ever actually existed, then when you are asked whether or not you have agreed upon your verdict, you simply say you find in favor of the defendants; but if you find

otherwise, and that combination did exist and had that element of unreasonableness to which I have referred, and therefore was unlawful—if you find that in favor of the plaintiff and that unlawful conspiracy did exist, then, as I have said, you go to the second question: Has the plaintiff suffered any loss in business or property because of that?

Here again if you find that it has not, then your verdict would be in favor of the Defendant, notwithstanding the fact that you had found that an unlawful conspiracy existed.

But if you find that second question in favor of the Plaintiff, to wit, that it has been injured in its business or property by an unlawful combination or conspiracy on the part of the Defendants, then you go to the final question in the case, and that is, how much; at what amount are you to assess the damages which the Plaintiff has sustained? In other words, what are you to assess, expressed in dollars and cents, as the loss you would have found in that case the Plaintiff had sustained?

I always give this admonition to juries, that whenever you are called upon to deal with a money question of any kind you have need for the best common sense judgment that you possess. It is easy enough to get carried away by whim or fancy into an extravagant view of a case either one way or the other. Here is where you are called upon to give your best efforts and your best judgments to determine what the damage is.

Here is a man who is in business. We will say an unlawful conspiracy is raised to take that business away from him and keep him from getting business which he would have otherwise hoped to have gotten. That is the mountain cloud idea; that seems perfectly clear and perfectly simple. But when you approach that with the idea that you are going to put a figure

on that loss, you will see at once not only the difficulty of doing it, but the impossibility of doing it. You couldn't determine, after giving the subject all the thought of which you are capable, what proportion of the business he should have been doing, or catching, as the vernacular expression is; how much of that trade he would have received had it not been for this unlawful combination. You can't do it; therefore the very capable counsel who represents the Plaintiff in this case has told you very plainly that he was not going to ask you to do something which he recognized and realized you could not do.

But there is this in the case: The defendant warehouse company received a substantial sum of money for services which, under the evidence, you may find were not rendered to the railroad company but were rendered to itself. You can see that that would put a very formidable weapon into its hands in dealing with its competitors.

If you and I are in competition, and somebody for some reason or other comes along and agrees that they will give me a substantial sum of money which you don't get and which you can't get, at once I have in my hands an instrument which, if I use it, I may use to take away your trade. How? Having this resort to an additional sum of money which you don't have, I can undercut you on prices, and you have only one of two things to do; let your business slip away from you and go to me, who is offering to do the same service at a less price, or you must cut your price in order to meet the price which I have set up and established.

The argument has been addressed to you that to the extent to which the Plaintiff was compelled to do that in this case, to that extent its damages are measureable and ascertainable, because it is a contrast between what may be called the fair price which you are

justified in expecting you would have received had these unfair practices not been directed against you and what you did receive in the face of that competition.

You may say that is vague, too; how much would he have received? It is vague. Nevertheless, it can be measured, and you are called upon to measure it every day.

Suppose you and I make a contract and you agree to do something for me or to sell me something and we don't agree on the price. When you come to ask payment I say, "No, I won't pay you any such price as that; that is too high; I will only pay you so much; that is the fair price." We can't agree upon the fair price of the thing which you have sold me, or the fair value of the services which you have rendered. It is the commonest thing in the world for you to bring suit against me, and you would claim upon what lawyers call a "quantum meruit." How much are your services worth? You would submit it to a jury to determine what those services are generally worth, and that jury would be able with the guidance of the Court and the help of the evidence to determine what those services fairly are worth, or what the fair value of that product was, and for that amount you could get a judgment against me. That is the thought of an appeal which I understand Plaintiff is making to you in this case.

Now, there is the other element of the disadvantage to which the Plaintiff was put by reason of this demurrage. That has been so elaborately and clearly discussed before you that I will do no more than call your attention to it as another element in the claim of damage which the Plaintiff makes in this case.

Let me call your attention to something: If you and I are competitors in business, as I instanced before, and some one makes a contribution to me of a

substantial sum of money which you do not get, that gives me, undoubtedly, a great advantage over you. Or, if I am relieved from the payment of some overhead or other charge to which you are necessarily subjected, so that in your business it must enter into the cost of your production but it doesn't enter into mine and I can thereby produce at a less cost than you can, that is clearly a great advantage to me, isn't it?

Everybody would recognize that upon that statement, but it is no harm to you if that is all that is done. It is perfectly natural for us to be a little envious and jealous of our competitors, and you might question the fact that I have that advantage over you, but if I don't use that advantage to your disadvantage or your loss, it doesn't hurt you any.

The question is not whether the Merchants Warehouse Company received these benefits and these advantages, but before there is any loss to this Plaintiff or any other warehousemen the evidence must convince you that that advantage and that benefit to the Merchants was used in such a way as to cause loss to the Plaintiff. The Plaintiff has introduced evidence and has addressed arguments to you from their point of view which have been answered by the evidence and arguments on behalf of the Defendants. This and the measure of damages has been so fully and so clearly discussed by counsel that I need not dwell upon it.

That is all there is in this case. Let me recapitulate: The first question is—and you can easily grasp the question, however difficult it may be to find an answer to it—have these Defendants conspired or combined in an unlawful combination or conspiracy in restraint of trade, or to create or promote a monopoly in matters which concern interstate commerce? That is your first question. I repeat that if your answer to that question is in the negative, then your verdict should be in favor of the Defendants.

Then you go to the second question: Has the Plaintiff suffered any loss in business or property by reason of that unlawful combination if you find the unlawful combination to exist. If your answer to that question is in the negative, again I say to you that your verdict should be in favor of the Defendants.

Then you go to the third question, if you determine that question, also, in favor of the Plaintiff. The third question, as I have said, is the question of how much shall be your verdict. You will determine that question, and when you are asked as to whether or not you have agreed upon your verdict, if it should be in favor of the Plaintiff, you say we find in favor of the Plaintiff, and assess the damages at so much, at whatever sum you find those damages to be. If, on the other hand, as I have indicated, your judgment is otherwise, then your answer to the same question is we find in favor of the Defendants, and you need say no more.

I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly. If there is any special points which counsel desires to have specifically answered, if it hasn't already been answered, I will answer it.

MR. BARNES: Mr. McCracken will speak on the points, if your Honor please. I ask your Honor to grant me an exception to that portion of your charge in which you broadly stated that the Commission had decided that the contract was unfair and illegal, and the Commission stopped the privileges under it. My reason for that is all that has been decided is with respect to the Interstate Commerce Act, and that case doesn't deal with the legality of these contracts with respect to the Sherman Act. Is it proper to call your Honor's attention to that?

THE COURT: Yes. I thought I had made that perfectly clear.

As I have said to you gentlemen, that, in itself, aside from the help that it may be to decide the first question that I have submitted to you—it may be helpful to you on that point, and it may throw some light on it—we have nothing to do with the desist order. You understand that that is under a different provision of the law and has a different purpose.

The law has taken charge, as I have explained to you, of the general supervision of the railroad carrier business, supervises all the practices in which they delve, or the rules under which they do business, prices charged for passenger fares and for freight rates; everything of that kind. Any one who has a complaint, and, indeed, the Commission under certain circumstances without any complaint, may take up the question of a particular practice, or a particular rule, or a particular tariff and determine whether or not in their judgment it is in conformity with the law. If they find it is not, and the practice indulged in is improper, unfair in that sense, and an illegal practice, it may require the carrier to desist from it. But that controversy is between the shipper and the carriers exclusively.

MR. BARNES: That doesn't control this case.

THE COURT: I have already said that——

MR. BARNES: I think you have, sir.

THE COURT: A great many times, and as clear as I can state it.

MR. BARNES: You stated very definitely that there is evidence in this case that the commerce was interstate commerce; that is our point. I ask an exception to that statement, or else a ruling on that point, whichever your Honor prefers.

THE COURT: No; I grant you an exception.

MR. BARNES: If your Honor please, it is my duty to point out to you very fully the discussion as to the etymological meaning of conspire or combination. Of course, there may be perfectly lawful combinations, contracts and arrangements. I think I would like your Honor to state that to the jury. The mere fact there is a contract or an arrangement doesn't make it an evil one condemned by the statute.

THE COURT: Gentlemen of the jury: I think I made that perfectly clear to you. It isn't every agreement, every contract, every combination, or in the original sense, every conspiracy that is unlawful by any means. Combinations are being made, as we all know, every day; contracts are being made, as we all know, every day. That is not what is condemned. I read the Act to you; it is that kind of an unlawful combination or restraint of trade which is condemned and denounced by the law.

MR. BARNES: May I call, again, your Honor's attention to the fact that within your charge you said in one portion of it the fact these rates have been declared to be preferential or improper rates would constitute a conspiracy under this Act.

THE COURT: I don't think I say that.

MR. BARNES: I understood it, and I thought I would call your Honor's attention to it. I thought you didn't intend to make that statement.

THE COURT: I will say, I am afraid almost for the nth time, that we are not trying this case upon the lawfulness or unlawfulness of that contract, and in that sense we have nothing to do with the contract.

This action is brought under what I read to you as the Sherman Anti-Trust Act, and the question is whether or not the Defendants have engaged in the

unlawful conspiracy denounced by that Act. The question of this previous contract, its lawfulness or unlawfulness, doesn't concern us except insofar as it helps you to decide the second question that I submitted to you.

MR. MCCRACKEN: May I take exception to all those parts of your Honor's charge in which you told the jury that they might find that a measure of damages had been established in this case based upon the difference between what can be received and what might be called the fair market value of the service which it rendered, it being my point that there is no evidence whatsoever in this case that the so-called normal or usual rate, or regular tariff upon which the Plaintiff bases his claim for damages ever prevailed in this market or any other, and there is specific, positive evidence that it never did. Will your Honor give me an exception to that part of the charge?

THE COURT: Certainly, I will give you an exception to what I said.

MR. MCCRACKEN: I would also like an exception to that part of your Honor's charge in which you say that the Defendant warehouse company was in receipt of a substantial contribution which it might have used as a formidable weapon as against the Plaintiff, it being my thought that there wasn't any contribution; it was a payment for services rendered. It was payment on account of services rendered, there being no evidence that it was ever used against the Plaintiff.

THE COURT: Exception granted.

I think your Honor will grant me an exception on those points which your Honor did not charge as we have requested.

THE COURT: Exception granted.

DEFENDANTS' POINTS FOR CHARGE.

1. The defendant, Merchants Warehouse Company, was not engaged in trade or commerce among the several states.

2. The defendant, Merchants Warehouse Company, was not engaged in and did not render transportation services.

3. The interstate commerce or transportation by the defendant, The Pennsylvania Railroad Company, of freight from points outside of the State of Pennsylvania, consigned to or in care of the defendant, Merchants Warehouse Company, ceased upon the delivery thereof to the designated warehouse and such shipments thereupon lost their character of interstate shipments.

4. The interstate commerce or transportation by the defendant, The Pennsylvania Railroad Company, of freight delivered to it at warehouses of the defendant, Merchants Warehouse Company, and consigned to points outside of the State of Pennsylvania, commenced on the delivery of the shipments to the Railroad Company and such freight did not acquire the character of interstate shipments until it was so delivered to the Railroad Company.

5. The report and order of the Interstate Commerce Commission in the case of Gallagher, et al. v. The Pennsylvania Railroad Company, reported in 160 I. C. C. 563, and the decision of the Supreme Court of the United States in the same case, reported in 283 U. S. 501, are not evidence that the defendants had violated the Sherman Anti-Trust Act of July 2, 1890.

6. There was no evidence in this case that the defendants secured for themselves more than their just, fair and normal portion of all of the warehous-

ing and complementary transportation business in Philadelphia.

7. In determining whether or not the defendant, Merchants Warehouse Company, obtained more than its just, fair and reasonable share of the warehousing business of Philadelphia, the jury may and should take into consideration the undisputed facts that the said defendant's business antedates by eighteen years the establishment of the plaintiff's business, that whereas the defendant's business has steadily decreased during the six year period in suit, the plaintiff's business has shown a corresponding substantial increase and that there are at least ten other competing warehouse systems in Philadelphia who share in the warehouse business of that City.

8. There is no evidence in this case that the defendants secured for themselves such a large percentage of the warehousing and complementary transportation business in Philadelphia in many of the heavier commodities, among them flour, newsprint paper, canned goods and sugar, as to constitute a monopoly of said part of the warehousing and complementary transportation business.

9. Specialization in the warehousing of certain commodities is a different thing from the monopoly of the warehousing and complementary transportation business, and the fact of such a specialization cannot be the basis of a finding that a monopoly of the warehousing and complementary transportation business, existed.

10. There is no evidence in this case that the defendants combined or conspired to restrain trade or commerce among the several states.

11. In order to find a verdict for the plaintiff, the jury must believe that both defendants, at the time the contracts were made and during the continuance thereof, united in a conspiracy to violate the Sherman Anti-Trust Act by conspiring to restrain trade or commerce between the several states.

12. The burden of proof is on the plaintiff to show to the satisfaction of the jury by the preponderance of the credible evidence that such conspiracy in fact existed.

13. The agreements between the defendants here in evidence represent service undertakings on the part of the Merchants Warehouse Company for which payments were to be made by the Pennsylvania Railroad and nothing more. They constitute no evidence of a conspiracy to violate the Sherman Act of 1890, as amended.

14. Intent is a necessary element in a conspiracy such as is here alleged, and in determining whether or not the defendants conspired to violate the Sherman Act, the jury may and should take into consideration the undisputed facts that the first of the series of contracts between the defendants antedate the Sherman Act, that the several contracts between the defendants were openly arrived at and were known to the State and Federal authorities, including the Director General of Railroads representing the United States, and that similar contracts have existed between the Reading Railroad and also the Baltimore & Ohio Railroad and the Pennsylvania Warehousing and Safe Deposit Company for upwards of thirty-five years, which contracts were likewise known to the aforesaid State and Federal authorities.

15. In order to find a verdict for the plaintiff, the jury must believe that the defendants monopolized or

attempted to monopolize or combined or conspired to monopolize any part of the trade or commerce among the several states, and the burden of proof is on the plaintiff to show by the preponderance of the credible evidence that at the time the contracts were made, and during the continuance thereof, the defendants jointly monopolized or attempted to monopolize or combined or conspired to monopolize such trade or commerce.

16. There is no evidence in this case that the defendants monopolized any part of the trade or commerce among the several states.

17. There is no evidence in this case that the defendants attempted to monopolize any part of the trade or commerce among the several states.

18. There is no evidence in this case that the defendants combined or conspired to monopolize any part of the trade or commerce among the several states.

19. Under the evidence in this case, the plaintiff's only right of action was under the Interstate Commerce Act of February 4, 1887, as amended, and no right of action exists with respect thereto under the Sherman Act of July 2, 1890, as amended.

20. By proceeding before the Interstate Commerce Commission to obtain reparation for losses alleged by it to have been suffered by reason of the operations under the contracts between the defendants in evidence in this case, plaintiff elected its remedy and under all the evidence has no right of action under the Sherman Act of July 2, 1890, as amended.

21. Since it appears that in a proceeding before the Interstate Commerce Commission the plaintiff made a claim for damages based upon the same grounds upon which damages are now claimed in this

action, and that the Commission refused to award reparation, and on petition for reconsideration affirmed its refusal to award reparation in the nature of damages, the plaintiff cannot now recover such damages in this action.

22. The amounts paid by the Pennsylvania Railroad Company to the Merchants Warehouse Company are not evidence of the measure of plaintiff's damage, and if you find a verdict for the plaintiff you may not consider those payments in fixing the amount of your verdict.

23. The difference between the total receipts of the plaintiff for handling shipments in its warehouse business and the amount which Mr. Sullivan testified should have been received, does not represent a measure of the plaintiff's damage, if any, and if you find a verdict for the plaintiff you may not base it on such difference.

24. Since the total figure testified to by the plaintiff as representing the difference between the amount which it did receive and the amount which it should have received, is based upon shipments received not only over the Pennsylvania Railroad but also over the Reading Railroad, by truck and by steamship, you may not base a finding of damage upon such total figure.

25. It appearing in this case and also in a prior proceeding between the same parties that like arrangements as these here complained of existed between other warehouses and other railways in the City of Philadelphia doing a business substantially equal to that of the plaintiff and defendant, it would be impossible for you to say in the absence of any affirmative evidence by the plaintiff, just how much, if any, damage was done to the plaintiff by these defendants

and how much, if any, by other warehouses and other railroads who are not made parties defendant to this suit.

26. The detention of railroad cars prior to their arrival at the warehouses of the defendant, Merchants Warehouse Company, and the non-charging of demurrage on said cars by the defendant, The Pennsylvania Railroad Company, is not an item of damage in this case and may not be considered by the jury in fixing the amount of a verdict, if the jury should determine upon a verdict for the plaintiff.

27. The burden of proving damages is on the plaintiff and unless you are satisfied by the preponderance of the credible evidence that the plaintiff has proved the amount of its damage, if any, which was caused by the defendants, the Merchants Company and The Pennsylvania Railroad Company, your verdict must be for the defendants.

28. You may not guess what, if any, damage the defendants, the Merchants Company and The Pennsylvania Railroad Company, caused the plaintiff, and unless there is evidence warranting you in finding a specific amount of damage caused by the defendants, your verdict must be for the defendant.

29. The plaintiff has attempted to measure its damage by showing the amount received from its patrons for handling freight shipped by rail and truck and also the amount which it believes it should have received upon what it terms "normal rate basis". Its only definition of such normal rate basis is that that is the amount which it should have received in order to make a profit after deducting its costs of operation. There is no evidence that this so-called normal rate was ever received by anybody in the warehouse business in Philadelphia for doing this work and there

is specific evidence that it was not. Under these conditions you are not justified in finding such so-called normal rate as any standard of comparison upon which to base a claim for damages.

30. Without the establishment of a prevailing rate basis, the plaintiff's theory of measuring damages by comparing the amounts actually received with the amounts which would have been received upon a normal rate basis must fail.

31. Under the evidence in this case there can be no verdict rendered by you against the defendants for more than nominal damages.

32. The defendant, The Pennsylvania Railroad Company, was subject to rulings of the Interstate Commerce Commission and under the rulings of that Commission, which has been announced prior to and including the date of the latest contract between the defendants, there was no disapproval of the arrangement entered into by the defendants under their contracts.

33. If the defendants in good faith believed that the Merchants Warehouse Company was the agent of The Pennsylvania Railroad Company and that they might lawfully enter into the contracts complained of in this suit, you may not find a conspiracy between the defendants and your verdict must be for the defendants.

34. Under all the evidence in the case your verdict must be for the defendants.

(Sgd.) ROBERT T. MCCRACKEN
Attorneys for Merchants Warehouse Company.
(Sgd.) JOHN HAMPTON BARNES
Attorneys for The Pennsylvania Railroad Company.

VERDICT OF JURY.

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 16,774. March Term, 1932.

Terminal Warehouse Company, a Corporation,

v.

Pennsylvania Railroad Company, a Corporation, and Merchants Warehouse Company, a Corporation.

Before HON. OLIVER B. DICKINSON, *J.*, and a jury.

Philadelphia, Pa.,
Tuesday, March 27, 1934,
at 10 A. M.

Present: THOMAS RAEBURN WHITE, ESQ., JOHN J. HICKEY, ESQ., and RICHARD C. BULL, ESQ., for the plaintiff;
JOHN HAMPTON BARNES, ESQ., and PHILIP PRICE, ESQ., for Pennsylvania Railroad Co., a defendant;
M. HAMPTON TODD, ESQ., ROBERT T. MCCRACKEN, ESQ., and GEORGE G. CHANDLER, ESQ., for Merchants Warehouse Co., a defendant.

THE COURT: Members of the jury: You may retire to your rooms to deliberate upon your verdict.

(The jury returned with a verdict in favor of the plaintiff in the sum of $136,125.)

ORDER SEALING BILL OF EXCEPTIONS.

And thereupon counsel for the above-named defendants did then and there except to the rulings of said Court on questions of evidence propounded during the course of the trial, as appears by the foregoing transcript of the evidence, and requested that the seal of the Judge should be affixed thereto, which was done according to the form of the statute in such case made and provided.

And thereupon counsel for the said defendants did then and there except to the aforesaid charge and opinion of the said Court, as appears by the foregoing transcript of the charge, and inasmuch as the said charge and opinion so excepted to do not appear on the record, the said counsel for the said defendants did then and there tender this bill of exceptions to the rulings and charge of the said Court, and requested the seal of the Judge aforesaid should be put to the same according to the form of the statute in such case made and provided.

And thereupon, the aforesaid Judge, at the request of the said counsel for the said defendants, and it appearing that counsel for the plaintiff has read and approved of the said bill of exceptions, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this eighth day of August, A. D. 1934.

O. B. DICKINSON,
J.

Approved August 7, 1934.
WHITE, SCHNADER, MARIS & CLAPP,
Attorneys for Plaintiff.

ORDER EXTENDING TIME FOR FILING OF MOTIONS FOR NEW TRIAL BY DEFENDANTS.

(Filed March 28, 1934.)

IN THE UNITED STATES DISTRICT COURT, FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 16,774. March Term, 1932.

Terminal Warehouse Company, a Corporation,

v.

Pennsylvania Railroad Company, a Corporation, and Merchants Warehouse Company, a Corporation.

Before DICKINSON, *J.*

AND NOW, to wit, March 29, 1934, on motion of John Hampton Barnes, Esq., counsel for Pennsylvania Railroad Company, and Robert T. McCracken, Esq., counsel for Merchants Warehouse Company, and it appearing that the transcript of the Court's charge to the jury was submitted to the learned Trial Judge for corrections if any before the said transcript was available to counsel and it further appearing that the defendants were thereby delayed in procuring a transcript of said charge for the purpose of including their exceptions thereto in their motions for a new trial, it is hereby ORDERED and DECREED that the defendants in the above-entitled cause of action shall have up to and including April 6, 1934, within which to file their motions for a new trial and that the present term of court as well as the time within which to file said motions for a new trial shall be deemed to have been extended to the aforesaid date for the said purpose.

By THE COURT,

Attest:

GEORGE BRODBECK,
Clerk.

MOTION AND REASONS OF THE DEFENDANT, MERCHANTS WAREHOUSE COMPANY, FOR A NEW TRIAL.

(Filed April 3, 1934.)

And Now, to wit, April 3, 1934, comes the defendant, Merchants Warehouse Company, by its attorney, Robert T. McCracken, Esquire, and moves the Court to grant a new trial and assigns therefor the following reasons:

1. The verdict was against the law.

2. The verdict was against the evidence.

3. The verdict was against the weight of the evidence.

4. The learned trial Judge erred in declining to charge, as requested by the defendant in its first point for charge, as follows:

> "1. The defendant, Merchants Warehouse Company, was not engaged in trade or commerce among the several states."

to which an exception was duly allowed as follows:

> "I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

5. The learned trial Judge erred in declining to charge, as requested by the defendant in its second point for charge, as follows:

> "2. The defendant, Merchants Warehouse Company, was not engaged in and did not render transportation services."

to which an exception was duly allowed as follows:

> "I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

6. The learned trial Judge erred in declining to charge, as requested by the defendant in its third point for charge, as follows:

> "3. The interstate commerce or transportation by the defendant, The Pennsylvania Railroad Company, of freight from points outside of the State of Pennsylvania, consigned to or in care of the defendant, Merchants Warehouse Company, ceased upon the delivery thereof to the designated warehouse and such shipments thereupon lost their character of interstate shipments."

to which an exception was duly allowed as follows:

> "I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

7. The learned trial Judge erred in declining to charge, as requested by the defendant in its fourth point for charge, as follows:

> "4. The interstate commerce or transportation by the defendant, The Pennsylvania Railroad Company, of freight delivered to it at warehouses of the defendant, Merchants Warehouse Company, and consigned to points outside of the State of Pennsylvania, commenced on the delivery of the shipments to the Railroad Company and such freight did not acquire the character of interstate shipments until it was so delivered to the Railroad Company."

to which an exception was duly allowed as follows:

> "I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

8. The learned trial Judge erred in declining to charge, as requested by the defendant in its sixth point for charge, as follows:

> "6. There was no evidence in this case that the defendants secured for themselves more than their just, fair and normal portion of all of the warehousing and complementary transportation business in Philadelphia."

to which an exception was duly allowed as follows:

> "I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

9. The learned trial Judge erred in declining to charge, as requested by the defendant in its seventh point for charge, as follows:

> "7. In determining whether or not the defendant, Merchants Warehouse Company, obtained more than its just, fair and reasonable share of the warehousing business of Philadelphia, the jury may and should take into consideration the undisputed facts that the said defendant's business antedates by eighteen years the establishment of the plaintiff's business, that whereas the defendant's business has steadily decreased during the six year period in suit, the plaintiff's business has shown a corresponding substantial increase and that there are at least ten other competing warehouse systems in Philadelphia who share in the warehouse business of that City."

to which an exception was duly allowed as follows:

> "I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

10. The learned trial Judge erred in declining to charge, as requested by the defendant in its eighth point for charge, as follows:

> "8. There is no evidence in this case that the defendants secured for themselves such a large percentage of the warehousing and complementary transportation business in Philadelphia in many of the heavier commodities, among them flour, newsprint paper, canned goods and sugar, as to constitute a monopoly of said part of the warehousing and complementary transportation business."

to which an exception was duly allowed as follows:

> "I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

11. The learned trial Judge erred in declining to charge, as requested by the defendant in its ninth point for charge, as follows:

> "9. Specialization in the warehousing of certain commodities is a different thing from the monopoly of the warehousing and complementary transportation business, and the fact of such a specialization cannot be the basis of a finding that a monopoly of the warehousing and complementary transportation business existed."

to which an exception was duly allowed as follows:

> "I think I have covered all the points addressed to me; insofar as affirmed in the general charge,

they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

12. The learned trial Judge erred in declining to charge, as requested by the defendant in its tenth point for charge, as follows:

> "10. There is no evidence in this case that the defendants combined or conspired to restrain trade or commerce among the several states."

to which an exception was duly allowed as follows:

> "I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

13. The learned trial Judge erred in declining to charge, as requested by the defendant in its eleventh point for charge, as follows:

> "11. In order to find a verdict for the plaintiff, the jury must believe that both defendants, at the time the contracts were made and during the continuance thereof, united in a conspiracy to violate the Sherman Anti-Trust Act by conspiring to restrain trade or commerce between the several states."

to which an exception was duly allowed as follows:

> "I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

14. The learned trial Judge erred in declining to charge, as requested by the defendant in its twelfth point for charge, as follows:

"12. The burden of proof is on the plaintiff to show to the satisfaction of the jury by the preponderance of the credible evidence that such conspiracy in fact existed."

to which an exception was duly allowed as follows:

"I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

15. The learned trial Judge erred in declining to charge, as requested by the defendant in its thirteenth point for charge, as follows:

"13. The agreements between the defendants here in evidence represent service undertakings on the part of the Merchants Warehouse Company for which payments were to be made by The Pennsylvania Railroad and nothing more. They constitute no evidence of a conspiracy to violate the Sherman Act of 1890, as amended."

to which an exception was duly allowed as follows:

"I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

16. The learned trial Judge erred in declining to charge, as requested by the defendant in its fourteenth point for charge, as follows:

"14. Intent is a necessary element in a conspiracy such as is here alleged, and in determining whether or not the defendants conspired to violate the Sherman Act, the jury may and should take into consideration the undisputed facts that the first of the series of contracts between the defend-

ants antedate the Sherman Act, that the several contracts between the defendants were openly arrived at and were known to the State and Federal authorities, including the Director General of Railroads representing the United States, and that similar contracts have existed between the Reading Railroad and also the Baltimore & Ohio Railroad and the Pennsylvania Warehousing and Safe Deposit Company for upwards of thirty-five years, which contracts were likewise known to the aforesaid State and Federal authorities."

to which an exception was duly allowed as follows:

"I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

17. The learned trial Judge erred in declining to charge, as requested by the defendant in its fifteenth point for charge, as follows:

"15. In order to find a verdict for the plaintiff, the jury must believe that the defendants monopolized or attempted to monopolize or combined or conspired to monopolize any part of the trade or commerce among the several states, and the burden of proof is on the plaintiff to show by the preponderance of the credible evidence that at the time the contracts were made, and during the continuance thereof, the defendants jointly monopolized or attempted to monopolize or combined or conspired to monopolize such trade or commerce."

to which an exception was duly allowed as follows:

"I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

18. The learned trial Judge erred in declining to charge, as requested by the defendant in its sixteenth point for charge, as follows:

> "16. There is no evidence in this case that the defendants monopolized any part of the trade or commerce among the several states."

to which an exception was duly allowed as follows:

> "I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

19. The learned trial Judge erred in declining to charge, as requested by the defendant in its seventeenth point for charge, as follows:

> "17. There is no evidence in this case that the defendants attempted to monopolize any part of the trade or commerce among the several states."

to which an exception was duly allowed as follows:

> "I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

20. The learned trial Judge erred in declining to charge, as requested by the defendant in its eighteenth point for charge, as follows:

> "18. There is no evidence in this case that the defendants combined or conspired to monopolize any part of the trade or commerce among the several states."

to which an exception was duly allowed as follows:

> "I think I have covered all the points addressed to me; insofar as affirmed in the general

charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

21. The learned trial Judge erred in declining to charge, as requested by the defendant in its nineteenth point for charge, as follows:

> "19. Under the evidence in this case, the plaintiff's only right of action was under the Interstate Commerce Act of February 4, 1887, as amended and no right of action exists with respect thereto under the Sherman Act of July 2, 1890, as amended."

to which an exception was duly allowed as follows:

> "I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

22. The learned trial Judge erred in declining to charge, as requested by the defendant in its twentieth point for charge, as follows:

> "20. By proceeding before the Interstate Commerce Commission to obtain reparation for losses alleged by it to have been suffered by reason of the operations under the contracts between the defendants in evidence in this case, plaintiff elected its remedy and under all the evidence has no right of action under the Sherman Act of July 2, 1890, as amended."

to which an exception was duly allowed as follows:

> "I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

23. The learned trial Judge erred in declining to charge, as requested by the defendant in its twenty-first point for charge, as follows:

> "21. Since it appears that in a proceeding before the Interstate Commerce Commission the plaintiff made a claim for damages based upon the same grounds upon which damages are now claimed in this action, and that the Commission refused to award reparation, and on petition for reconsideration affirmed its refusal to award reparation in the nature of damages, the plaintiff cannot now recover such damages in this action."

to which an exception was duly allowed as follows:

> "I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

24. The learned trial Judge erred in declining to charge, as requested by the defendant in its twenty-second point for charge, as follows:

> "22. The amounts paid by The Pennsylvania Railroad Company to the Merchants Company are not evidence of the measure of plaintiff's damage, and if you find a verdict for the plaintiff you may not consider those payments in fixing the amount of your verdict."

to which an exception was duly allowed as follows:

> "I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

25. The learned trial Judge erred in declining to charge, as requested by the defendant in its twenty-third point for charge, as follows:

"23. The difference between the total receipts of the plaintiff for handling shipments in its warehouse business and the amount which Mr. Sullivan testified should have been received, does not represent a measure of the plaintiff's damage, if any, and if you find a verdict for the plaintiff you may not base it on such difference."

to which an exception was duly allowed as follows:

"I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

26. The learned trial Judge erred in declining to charge, as requested by the defendant in its twenty-fourth point for charge, as follows:

"24. Since the total figure testified to by the plaintiff as representing the difference between the amount which it did receive and the amount which it should have received is based upon shipments received not only over the Pennsylvania Railroad but also over the Reading Railroad, by truck and by steamship, you may not base a finding of damage upon such total figure."

to which an exception was duly allowed as follows:

"I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

27. The learned trial Judge erred in declining to charge, as requested by the defendant in its twenty-fifth point for charge, as follows:

"25. It appearing in this case and also in a prior proceeding between the same parties that

like arrangements as these here complained of existed between other warehouses and other railways in the City of Philadelphia doing a business substantially equal to that of the plaintiff and defendant, it would be impossible for you to say in the absence of any affirmative evidence by the plaintiff, just how much, if any, damage was done to the plaintiff by these defendants and how much, if any, by other warehouses and other railroads who are not made parties defendant to this suit."

to which an exception was duly allowed as follows:

"I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

28. The learned trial Judge erred in declining to charge, as requested by the defendant in its twenty-sixth point for charge, as follows:

"26. The detention of railroad cars prior to their arrival at the warehouses of the defendant, Merchants Warehouse Company, and the non-charging of demurrage on said cars by the defendant, The Pennsylvania Railroad Company, is not an item of damage in this case and may not be considered by the jury in fixing the amount of a verdict, if the jury should determine upon a verdict for the plaintiff."

to which an exception was duly allowed as follows:

"I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

29. The learned trial Judge erred in declining to charge, as requested by the defendant in its twenty-seventh point for charge, as follows:

"27. The burden of proving damages is on the plaintiff and unless you are satisfied by the preponderance of the credible evidence that the plaintiff has proved the amount of its damage, if any, which was caused by the defendants, the Merchants Company and The Pennsylvania Railroad Company, your verdict must be for the defendants."

to which an exception was duly allowed as follows:

"I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

30. The learned trial Judge erred in declining to charge, as requested by the defendant in its twenty-eighth point for charge, as follows:

"28. You may not guess what, if any, damage the defendants, the Merchants Company and The Pennsylvania Railroad Company, caused the plaintiff, and unless there is evidence warranting you in finding a specific amount of damage caused by the defendants, your verdict must be for the defendants."

to which an exception was duly allowed as follows:

"I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

31. The learned trial Judge erred in declining to charge, as requested by the defendant in its twenty-ninth point for charge, as follows:

"29. The plaintiff has attempted to measure its damage by showing the amount received from

its patrons for handling freight shipped by rail and truck and also the amount which it believes it should have received upon what it terms 'normal rate basis.' Its only definition of such normal rate basis is that that is the amount which it should have received in order to make a profit after deducting its costs of operation. There is no evidence that this so-called normal rate was ever received by anybody in the warehouse business in Philadelphia for doing this work and there is specific evidence that it was not. Under these conditions you are not justified in finding such so-called normal rate as any standard of comparison upon which to base a claim for damages."

to which an exception was duly allowed as follows:

"I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

32. The learned trial Judge erred in declining to charge, as requested by the defendant in its thirtieth point for charge, as follows:

"30. Without the establishment of a prevailing rate basis, the plaintiff's theory of measuring damages by comparing the amounts actually received with the amounts which would have been received upon a normal rate basis must fail."

to which an exception was duly allowed as follows:

"I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

33. The learned trial Judge erred in declining to charge, as requested by the defendant in its thirty-first point for charge, as follows:

"31. Under the evidence in this case there can be no verdict rendered by you against the defendants for more than nominal damages."

to which an exception was duly allowed as follows:

"I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

34. The learned trial Judge erred in declining to charge, as requested by the defendant in its thirty-second point for charge, as follows:

"32. The defendant, The Pennsylvania Railroad Company, was subject to rulings of the Interstate Commerce Commission and under the rulings of that Commission, which had been announced prior to and including the date of the latest contract between the defendants, there was no disapproval of the arrangement entered into by the defendants under their contracts."

to which an exception was duly allowed as follows:

"I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

35. The learned trial Judge erred in declining to charge, as requested by the defendant in its thirty-third point for charge, as follows:

"33. If the defendants in good faith believed that the Merchants Warehouse Company was the agent of The Pennsylvania Railroad Company and that they might lawfully enter into the contracts complained of in this suit, you may not find a conspiracy between the defendants and your verdict must be for the defendants."

to which an exception was duly allowed as follows (N. T. 544):

> "I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

36. The learned trial Judge erred in declining to charge, as requested by the defendant in its thirty-fourth point for charge, as follows:

> "34. Under all the evidence in the case your verdict must be for the defendants."

to which an exception was duly allowed as follows (N. T. 544):

> "I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly."

37. The learned trial Judge erred in failing to read to the jury the several points submitted for charge by the defendant, and to answer the same separately, or to cover such answers in the general charge; to which an exception was duly allowed as follows (N. T. 548):

> "I think your Honor will grant me an exception on those points which your Honor did not charge as we have requested.
>
> THE COURT: Exception granted."

38. The learned trial Judge erred in admitting as Plaintiff's Exhibit No. 15 the letter dated June 15, 1928, from The Northwestern Consolidated Milling Co. to Terminal Warehouse Co. (N. T. 84):

to which the defendant duly objected as follows (N. T. 83-84);

"MR. MCCRACKEN: I object to the offer. I contend that we are entitled to cross-examine the witness who wrote that letter.

THE COURT: The offer is premature. You can not offer it until after cross-examination.

MR. MCCRACKEN: I am entitled to cross-examine the writer of this letter as to his real reason.

THE COURT: The offer is premature. If the objection is made on that ground, I will sustain it.

MR. MCCRACKEN: No, the objection is on the ground that it is a statement from a third party, whom we have no opportunity to cross-examine.

THE COURT: I will overrule the objection and admit the letter for the purpose of showing that prospective customers or patrons of the plaintiff company gave that reason for not dealing with them."

upon which the Court ruled as follows, duly sealing an exception (N. T. 84):

"Exception noted for defendants."

39. The learned trial Judge erred in admitting as Plaintiff's Exhibit No. 16 the letter dated February 10, 1928, from A. E. Turner & Company to Terminal Warehouse Company (N. T. 85):

to which the defendant duly objected as follows (N. T. 85):

"MR. MCCRACKEN: This is objected to for the reasons previously stated.

THE COURT: The objection is overruled and the letter admitted for the purpose heretofore stated on the record by the Court."

upon which the Court ruled as follows, duly sealing an exception (N. T. 85):

"Exception noted for defendants."

40. The learned trial Judge erred in admitting as Plaintiff's Exhibit No. 17 the letter dated June 22, 1925, from The Bon Ami Company, Inc., to Terminal Warehouse, (N. T. 90-91):

to which the defendant duly objected as follows, (N. T. 89-90):

"Mr. McCracken: This is objected to for the reasons heretofore stated, and also for the additional reason that it bears a date one year before the period named in this suit.

Mr. White: I do not think that is a valid objection. The conspiracy went back before the date of the suit. The letter indicates that business would be withheld even after the period began.

The Court: I will admit it and limit it to the complaint that the customer would deal with the warehousing company where he had the privilege of delivery direct to the jobbers, as called for.

(Exception noted for defendants.)

The Court: There will also be an exception noted for the plaintiff, if they desire, if you wish to present it for a further purpose. I think it is only admissible to show that the patrons of the warehouse were affected in bestowing their patronage by the fact whether or not deliveries could be made by the warehouse directly to the jobber.

Mr. White: That could be done by any warehouse.

Mr. Barnes: I make the further objection that the letter makes no reference to the Pennsylvania Railroad. The other railroads in the City of Philadelphia had the same kind of arrangements in regard to free storage and free service, so that this letter in no way has any effect upon the Pennsylvania Railroad, one of the defendants.

(Here ensued a discussion off the record, by direction of the Court.)

THE COURT: To make it clear, and the jury are so instructed, that letter is limited to the expression of the one thought, that there is an advantage in making shipments to a warehouse company and have that company make distribution to jobbers in less than carload lots."

upon which the Court ruled as follows, duly sealing an exception (N. T. 90):

"Exception noted for defendants."

41. The learned trial Judge erred in admitting as Plaintiff's Exhibits Nos. 19 and 20 the reports and schedules prepared by Robert H. Rissinger (N. T. 182), and further erred in admitting the testimony of the said Robert H. Rissinger relative to the amount of allowances paid during the period covered by the present suit to the Merchants Warehouse Company by the Pennsylvania Railroad Company, and also as to the extent of the detention of cars (N. T. 182-185):

to which the defendant duly objected as follows (N. T. 50-53a; 55-56a; 182-183):

"MR. MCCRACKEN: I object to any such admission of evidence, either as to the amount paid by the railroad to the warehouse company or as to the extent of the detention of cars. I would like to be heard upon that matter if there is any question about it."

"MR. MCCRACKEN: Yes, I think there is a differentiation definitely. The part which bears upon the demurrage comes within the category which your Honor named. The part which bears upon the amount paid is a matter of dollars and cents they paid, although in the long run it comes to the same thing, so far as inadmissibility is concerned. (Citing Interstate Commerce Commission v. The United States, 289 U. S., page 385.)

"MR. MCCRACKEN: May I state my objections to the testimony? My objections are, first, that

this evidence is admittedly not evidence of damage in this case. Second, that it is not evidence of a conspiracy to violate the anti-trust laws. Third, that this is evidence of an act or acts which, if they be illegal at all, are violative of the rulings of the Interstate Commerce Commission as interpreting the Interstate Commerce Act, and are hence exclusively within the jurisdiction of the commission. Fourth, that this evidence, if admissible at all, is admissible only after the foundation has been laid for its admission by showing that the plaintiff has been actually injured thereby and has suffered pecuniary damage as a result thereof.

THE COURT: The Pennsylvania Railroad under an arrangement with the Merchants Warehouse Company carried freight which was delivered to the Warehouse Company for distribution to its patrons. This was done under a contract between the Railroad Company and the Warehouse Company by which the latter acted as a freight agent of the Railroad and a warehouse was designated as a freight station. The records of the railroad show the extent of this traffic and are offered in evidence for the double purpose of showing the amount of money received by the Warehouse as service compensation and the amount of demurrage charges, from the payment of which the Warehouse Company was excused. The offer is objected to both by the Railroad Company and by the Warehouse Company.

We held that as the present action is for the loss incurred by the plaintiff by reason of the conspiracy between the defendants to give the Merchants Warehouse Company a monopoly of the local warehouse business, the evidence is inadmissible. The defendants then offered it to be followed up with evidence that the sum received by the Warehouse Company for services and demurrage, from the payment of which it was relieved, not only enabled the Merchants Warehouse Company to give its patrons better rates than other

Warehouse Companies were able to do, but that the Warehouse Company did actually give these better rates.

We think the offer thus followed up is admissible. Ordinarily we would not interfere with the order of proof followed by counsel, but we see no reason for not deferring the present offer until the promised evidence has been admitted.

We in consequence sustain the objection, with exception to the plaintiff, and with leave to re-offer the evidence after the promised evidence has been introduced."

"We object, if the Court please, for the same reasons given when the witness was formerly on the stand, and fully discussed with you. Those discussions appear upon page 54 and the following pages in the record, on which you made a ruling, which is shown on page 56; and we submit, further, that the testimony this morning does not take this witness's testimony out of the ruling which your Honor made at that time."

"MR. MCCRACKEN: Objected to.

MR. BARNES: So that the record may be complete as to the exact question asked, will you please read the question to the Court?

(Question read.)

MR. BARNES: We object, and Mr. McCracken also objects on behalf of the Merchants."

upon which the Court ruled as follows, duly sealing an exception (N. T. 182, 183):

"Objection overruled. Exception noted for defendants by direction of the Court."

"THE COURT: The objection is overruled for the same reasons before stated, and an exception is allowed to the defendants."

42. The learned trial Judge erred in admitting the testimony of Ernest V. D. Sullivan, president of Terminal Warehouse Company, relative to the revenue actually received for the handling of package freight in the warehouses of the Terminal Warehouse Company during the period in suit and the amount Terminal Warehouse Company would have received for handling the said package freight computed at the regular tariff rates of Terminal Warehouse Company (N. T. 160-163):

to which the defendant duly objected as follows (N. T. 96; 159-160; 161-162; 163):

> "MR. MCCRACKEN: I object to it and I would like to state my reasons. First, because of its mere statement,—it starts out with a premise of what this man terms a normal rate, which is an arbitrary figure, not established by any evidence in this case. Then it goes on to a shrunken rate, which again is an arbitrary figure, not established as a necessity. Secondly, because it does not appear that a single carload which was thus handled, would have been lost, or the business lost, had the lower rate not been charged. Third, because it is secondary evidence, the shippers themselves being the proper witnesses to prove that they would not have given their business to this warehouse. Fourth, it does not appear in this case that the Merchants Warehouse Company is the only warehouse company handling freight with so-called allowances. Fifth, because one of the defendants is the Pennsylvania Railroad, and under no circumstances could the Pennsylvania Railroad be made liable for payment of any loss which this man suffered for goods shipped by other railroads of which there are two in Philadelphia."
>
> "MR. MCCRACKEN: Your Honor, that is not what he stated yesterday. What he stated yesterday was that he intended to prove by this man, first, the normal amount of storage, whatever that may be, and whatever he got from the storage.

MR. WHITE: I asked him what he got for handling.

MR. MCCRACKEN: You said, 'storage' yesterday.

MR. WHITE: No, no; I didn't mean that. It relates to the handling charges on package freight through the warehouse.

MR. MCCRACKEN: If the Court please, that is not admissible in this case for the reason, among others, that this man stated on the witness stand that his company did not bear that charge, that it was passed on to his customers.

It is not also admissible from this volume, because this man stated on the witness stand yesterday that more than half of these shipments came over the Reading Railroad, and certainly that handling charge can not be charged to the Pennsylvania Railroad; and that certain portions came there by truck, and that can not be charged to any railroad."

"MR. MCCRACKEN: We also object for the additional reason that there has not been any definition in this case of what is a normal price."

"MR. MCCRACKEN: Then I object, sir, for the further reason that the witness testified on the stand yesterday that there were no such things as prevailing prices in Philadelphia."

"MR. BARNES: Yes, your Honor, I do. I move to strike out the answer, because it is based upon a statement that the difference was on the basis of a regular tariff rate for warehouse business, and he has already testified that there was no regular tariff rate."

upon which the Court ruled as follows, duly sealing an exception (N. T. 160, 162, 163):

"Objection overruled. Exception noted for the defendants by direction of the Court."

"Motion denied. Exception noted for defendants by direction of the Court."

43. The learned trial Judge erred in charging the jury relative to the measure of damages as follows (N. T. 540-541; 542-543; 543-544):

> "The argument has been addressed to you that to the extent to which the Plaintiff was compelled to do that in this case, to that extent its damages are measurable and ascertainable, because it is a contrast between what may be called the fair price which you are justified in expecting you would have received had these unfair practices not been directed against you and what you did receive in the fact of that competition.
>
> You may say that is vague, too; how much would he have received? It is vague. Nevertheless, it can be measured, and you are called upon to measure it every day.
>
> Suppose you and I make a contract and you agree to do something for me or to sell me something and we don't agree on the price. When you come to ask payment I say, 'No, I won't pay you any such price as that; that is too high; I will only pay you so much; that is the fair price.' We can't agree upon the fair price of the thing which you have sold me, or the fair value of the services which you have rendered. It is the commonest thing in the world for you to bring suit against me, and you would claim upon what lawyers call a "quantum meruit'. How much are your services worth? You would submit it to a jury to determine what those services are generally worth, and that jury would be able with the guidance of the Court and the help of the evidence to determine what those services fairly are worth, or what the fair value of that product was, and for that amount you could get a judgment against me. That is the thought of an appeal which I understand Plaintiff is making to you in this case."
>
> "The question is not whether the Merchants Warehouse Company received these benefits and these advantages, but before there is any loss to this Plaintiff or any other warehousemen the evi-

dence must convince you that that advantage and that benefit to the Merchants was used in such a way as to cause loss to the Plaintiff. The Plaintiff has introduced evidence and has addressed arguments to you from their point of view which have been answered by the evidence and arguments on behalf of the Defendants. This and the measure of damages has been so fully and so clearly discussed by counsel that I need not dwell upon it."

"Then you go to the third question, if you determine that question, also, in favor of the Plaintiff. The third question, as I have said, is the question of how much shall be your verdict. You will determine that question, and when you are asked as to whether or not you have agreed upon your verdict, if it should be in favor of the Plaintiff, you say we find in favor of the Plaintiff, and assess the damages at so much, at whatever sum you find those damages to be. If, on the other hand, as I have indicated, your judgment is otherwise, then your answer to the same question is we find in favor of the Defendants, and you need say no more."

to which an exception was duly sealed as follows (N. T. 547-548):

"MR. MCCRACKEN: May I take exception to all those parts of your Honor's charge in which you told the jury that they might find that a measure of damages had been established in this case based upon the difference between what can be received and what might be called the fair market value of the service which it rendered, it being my point that there is no evidence whatsoever in this case that the so-called normal or usual rate, or regular tariff upon which the Plaintiff bases his claim for damages ever prevailed in this market or any other, and there is specific, positive evidence that it never did. Will your Honor give me an exception to that part of the charge?

THE COURT: Certainly, I will give you an exception to what I said."

44. The learned trial Judge erred in charging the jury relative to the payments for services by the Pennsylvania Railroad Company to the Merchants Warehouse Company as follows (N. T. 522; 523; 524-525; 528; 540; 542):

> "Because of that, and because of the rendering of the services, real or nominal as they may have been, for the railroad company, the railroad undertook to pay, in this case, the Merchants Warehouse Company, a sum of money for the services thus rendered, precisely as they would have paid any other agent or employee of the railroad company. The aggregate of those payments has run into a quite substantial sum; I might not have carried it in my mind correctly, but if I have, it is something like $663,000 in the aggregate."
>
> "Of course, every other warehouse company would feel itself at a disadvantage because of the arrangement made between the Pennsylvania Railroad, the principal carrier in this district, or, at least, carrying a very large proportion of the freights that were carried, the Merchants Warehouse Company having been constituted the agent of the Pennsylvania Railroad and being paid this compensation for services. They would all feel that they were placed at a great disadvantage whether they were justified in the feeling or whether they were not, because that is human nature. Any of us who have competitors and rivals in business will resent the thought that that rival and that competitor gets what might be called an artificial advantage over us in the strife for business. That is human nature, and would be true of you or me, or any one else similarly situated. What is of advantage to one, however, as I will point out later, may be no loss or disadvantage to another."
>
> "The contracts between the Merchants Company and the Pennsylvania Railroad Company by which these advantages to which I have referred were given to the Merchants Company—or what,

at least, every competitive warehouseman would consider would be an advantage to them—has figured very largely in this case, and very much has been said about the lawfulness and unlawfulness of those contracts."

"But let me call your attention to what I have said before: I don't see that we are concerned in the least with whether it was lawful or not lawful except that it became an instrumentality, an element in another complaint which the Plaintiff in this case along with, possibly, other warehousemen made against the railroad company."

"But there is this in the case: The defendant warehouse company received a substantial sum of money for services which, under the evidence, you may find were not rendered to the railroad company but were rendered to itself. You can see that that would put a very formidable weapon into its hands in dealing with its competitors.

"If you and I are in competition, and somebody for some reason or other comes along and agrees that they will give me a substantial sum of money which you don't get and which you can't get, at once I have in my hands an instrument which, if I use it, I may use to take away your trade. How? Having this resort to an additional sum of money which you don't have, I can undercut you on prices, and you have only one of two things to do; let your business slip away from you and go to me, who is offering to do the same service at a less price, or you must cut your price in order to meet the price which I have set up and established."

"Let me call your attention to something: If you and I are competitors in business, as I instanced before, and some one makes a contribution to me of a substantial sum of money which you do not get, that gives me, undoubtedly, a great advantage over you. Or, if I am relieved from the payment of some overhead or other charge to which you are necessarily subjected, so that in your business it must enter into the cost of your production

but it doesn't enter into mine and I can thereby produce at a less cost than you can, that is clearly a great advantage to me, isn't it?

"Everybody would recognize that upon that statement, but it is no harm to you if that is all that is done. It is perfectly natural for us to be a little envious and jealous of our competitors, and you might question the fact that I have that advantage over you, but if I don't use that advantage to your disadvantage or your loss, it doesn't hurt you any."

to which an exception was duly sealed as follows (N. T. 548):

"MR. MCCRACKEN: I would also like an exception to that part of your Honor's charge in which you say that the Defendant warehouse company was in receipt of a substantial contribution which it might have used as a formidable weapon as against the Plaintiff, it being my thought that there wasn't any contribution; it was a payment for services rendered. It was payment on account of services rendered, there being no evidence that it was ever used against the Plaintiff.

THE COURT: Exception granted."

45. The verdict was excessive in amount.

ROBERT T. MCCRACKEN,
Attorney for Defendant,
Merchants Warehouse Company.

MOTION AND REASONS OF THE DEFENDANT, THE PENNSYLVANIA RAILROAD COMPANY, FOR A NEW TRIAL.

(Filed April 6, 1934.)

AND Now, to wit, April 6, 1934, the defendant, The Pennsylvania Railroad Company, by its attorneys, Barnes, Biddle & Myers, Esquires, moves the Court for a new trial of the issue in the above-entitled case and in support of said motion assigns the following reasons:

1. The learned trial Judge erred in overruling the defendant's objection to the admission in evidence of Plaintiff's Exhibit No. 15 (Test. p. 84).

2. The learned trial Judge erred in overruling the defendant's objection to the admission in evidence of Plaintiff's Exhibit No. 16 (Test. p. 85).

3. The learned trial Judge erred in overruling the defendant's objection to the admission in evidence of Plaintiff's Exhibit No. 17 (Test. p. 90).

4. The learned trial Judge erred in permitting the witness Sullivan to testify, over defendant's objection, to the amount received by the plaintiff for the handling of package freight during the period covered by the suit (Test. p. 160).

5. The learned trial Judge erred in permitting the witness Sullivan to testify, over the defendant's objection, to the amount that the plaintiff would have received for handling service computed at what was said to be plaintiff's regular tariff rates (Test. p. 162).

6. The learned trial Judge erred in overruling the defendant's motion to strike out the testimony of

the witness Sullivan as to what the plaintiff would have received for handling service computed at what was said to be the plaintiff's regular tariff rates (Test. p. 163).

7. The learned trial Judge erred in overruling the defendant's objection to the admission in evidence of the report and the supporting schedules prepared by the witness Rissinger (Test. pp. 181, 182).

8. The learned trial Judge erred in permitting the witness Rissinger to testify, over the defendant's objection, to the amount of the claims paid by The Pennsylvania Railroad Company to the Merchants Warehouse Company for tonnage handled during the period from March 1, 1926 to March 31, 1931 (Test. p. 183).

9. The learned trial Judge erred in overruling the defendant's motion to strike out the testimony of the witness Rissinger as to the amount of the claims paid by The Pennsylvania Railroad Company to the Merchants Warehouse Company for tonnage handled during the period from March 21, 1926 to March 31, 1931, (Test. p. 183), and the testimony of the witness Sullivan as to the amount of revenue received by the plaintiff for the handling of package freight (Test. p. 160), and the revenue for the handling service computed at what was said to be plaintiff's regular tariff rates (Test. p. 162); (Test. pp. 487, 488).

10. The learned trial Judge erred in charging the jury as follows (Test. p. 526):

> "They were applied to and asked to determine the merits of this contract to which I have alluded, and they decided that that contract was unfair, improper, illegal; and they issued what is called a 'desist order,' and that is that the car-

riers were to stop granting the privileges called for by that contract, and as soon as that was finally decided, the railroad companies cheerfully acquiesced in it, and since then the contract has not been in force, or acted upon."

11. The learned trial Judge erred in charging the jury as follows (Test. p. 529):

> "I have been asked to say to you that there is no evidence of interstate commerce in this case, I decline to say that to you. There is evidence in this case from which you may find that the business with which we are here concerned, the trade with which we are here concerned, the commerce with which we are here concerned, was in some measure, and, indeed, in large measure, interstate commerce. Therefore, the laws to which I will call your attention in a moment have application to it."

12. The learned trial Judge erred in charging the jury as follows (Te[illegible]39):

> "Here is a man who is in business. We will say an unlawful conspiracy is raised to take that business away from him and keep him from getting business which he would have otherwise hoped to have gotten. That is the mountain cloud idea; that seems perfectly clear and perfectly simple. But when you approach that with the idea that you are going to put a figure on that loss, you will see at once not only the difficulty of doing it, but the impossibility of doing it. You couldn't determine, after giving the subject all the thought of which you are capable, what proportion of the business he should have been doing, or catching, as the vernacular expression is; how much of that trade he would have received had it not been for this unlawful combination. You can't do it; therefore, the very capable counsel who represents the Plaintiff in this case has told you very plainly that he was not going to ask you to do something which he recognized and realized you could not do."

13. The learned trial Judge erred in charging the jury as follows (Test. p. 540):

> "But there is this in the case: The defendant warehouse company received a substantial sum of money for services which, under the evidence, you may find were not rendered to the railroad company but were rendered to itself. You can see that that would put a very formidable weapon into its hands in dealing with its competitors."

14. The learned trial Judge erred in declining defendant's first point for charge which was as follows (Test. p. 549):

> "1. The defendant, Merchants Warehouse Company, was not engaged in trade or commerce among the several states."

15. The learned trial Judge erred in declining defendant's second point for charge which was as follows (Test. p. 549):

> "2. The defendant, Merchants Warehouse Company, was not engaged in and did not render transportation services."

16. The learned trial Judge erred in declining defendant's third point for charge which was as follows (Test. p. 549):

> "3. The interstate commerce or transportation by the defendant, The Pennsylvania Railroad Company, of freight from points outside of the State of Pennsylvania, consigned to or in care of the defendant, Merchants Warehouse Company, ceased upon the delivery thereof to the designated warehouse and such shipments thereupon lost their character of interstate shipments."

17. The learned trial Judge erred in declining defendant's fourth point for charge which was as follows (Test. p. 549):

"4. The interstate commerce or transportation by the defendant, The Pennsylvania Railroad Company, of freight delivered to it at warehouses of the defendant, Merchants Warehouse Company, and consigned to points outside of the State of Pennsylvania, commenced on the delivery of the shipments to the Railroad Company and such freight did not acquire the character of interstate shipments until it was so delivered to the Railroad Company."

18. The learned trial Judge erred in declining defendant's sixth point for charge which was as follows (Test. p. 550);

"6. There was no evidence in this case that the defendants secured for themselves more than their just, fair and normal portion of all of the warehousing and complementary transportation business in Philadelphia."

19. The learned trial Judge erred in declining defendant's seventh point for charge which was as follows (Test. p. 550):

"7. In determining whether or not the defendant, Merchants Warehouse Company, obtained more than its just, fair and reasonable share of the warehousing business of Philadelphia, the jury may and should take into consideration the undisputed facts that the said defendant's business antedates by eighteen years the establishment of the plaintiff's business, that whereas the defendant's business has steadily decreased during the six year period in suit, the plaintiff's business as shown a corresponding substantial increase and that there are at least ten other competing warehouse systems in Philadelphia who share in the warehouse business of that City."

20. The learned trial Judge erred in declining defendant's eighth point for charge which was as follows (Test. p. 550):

"8. There is no evidence in this case that the defendants secured for themselves such a large percentage of the warehousing and complementary transportation business in Philadelphia in many of the heavier commodities, among them flour, newsprint paper, canned goods and sugar, as to constitute a monopoly of said part of the warehousing and complementary transportation business."

21. The learned trial Judge erred in declining defendant's ninth point for charge which was as follows (Test. p. 551):

"9. Specialization in the warehousing of certain commodities is a different thing from the monopoly of the warehousing and complementary transportation business, and the fact of such a specialization cannot be the basis of a finding that a monopoly of the warehousing and complementary transportation business existed."

22. The learned trial Judge erred in declining defendant's tenth point for charge which was as follows (Test. p. 551):

"10. There is no evidence in this case that the defendants combined or conspired to restrain trade or commerce among the several states."

23. The learned trial Judge erred in declining defendant's twelfth point for charge which was as follows (Test. p. 551):

"12. The burden of proof is on the plaintiff to show to the satisfaction of the jury by the preponderance of the credible evidence that such conspiracy in fact existed."

24. The learned trial Judge erred in declining defendant's thirteenth point for charge which was as follows (Test. p. 551):

"13. The agreements between the defendants here in evidence represent service undertakings on the part of the Merchants Warehouse Company for which payments were to be made by The Pennsylvania Railroad and nothing more. They constitute no evidence of a conspiracy to violate the Sherman Act of 1890, as amended."

25. The learned trial Judge erred in declining defendant's fourteenth point for charge which was as follows (Test. p. 552):

"14. Intent is a necessary element in a conspiracy such as is here alleged, and in determining whether or not the defendants conspired to violate the Sherman Act, the jury may and should take into consideration the undisputed facts that the first of the series of contracts between the defendants antedate the Sherman Act, that the several contracts between the defendants were openly arrived at and were known to the State and Federal authorities, including the Director General of Railroads representing the United States, and that similar contracts have existed between the Reading Railroad and also the Baltimore & Ohio Railroad and the Pennsylvania Warehousing and Safe Deposit Company for upwards of thirty-five years, which contracts were likewise known to the aforesaid State and Federal authorities."

26, The learned trial Judge erred in declining defendant's fifteenth point for charge which was as follows (Test. p. 552):

"15. In order to find a verdict for the plaintiff, the jury must believe that the defendants monopolized or attempted to monopolize or combined or conspired to monopolize any part of the trade or commerce among the several states, and the burden of proof is on the plaintiff to show by the preponderance of the credible evidence that at the time the contracts were made, and during

the continuance thereof, the defendants jointly monopolized or attempted to monopolize or combined or conspired to monopolize such trade or commerce."

27. The learned trial Judge erred in declining defendant's sixteenth point for charge which was as follows (Test. p. 552):

"16. There is no evidence in this case that the defendants monopolized any part of the trade or commerce among the several states."

28. The learned trial Judge erred in declining defendant's seventeenth point for charge which was as follows (Test. p. 553):

"17. There is no evidence in this case that the defendants attempted to monopolize any part of the trade or commerce among the several states."

29. The learned trial Judge erred in declining defendant's eighteenth point for charge which was as follows (Test. p. 553):

"18. There is no evidence in this case that the defendants combined or conspired to monopolize any part of the trade or commerce among the several states."

30. The learned trial Judge erred in declining defendant's nineteenth point for charge which was as follows (Test. p. 553):

"19. Under the evidence in this case, the plaintiff's only right of action was under the Interstate Commerce Act of February 4, 1887, as amended, and no right of action exists with respect thereto under the Sherman Act of July 2, 1890, as amended."

31. The learned trial Judge erred in declining defendant's twentieth point for charge which was as follows (Test. p. 553):

> "20. By proceeding before the Interstate Commerce Commission to obtain reparation for losses alleged by it to have been suffered by reason of the operations under the contracts between the defendants in evidence in this case, plaintiff elected its remedy and under all the evidence has no right of action under the Sherman Act of July 2, 1890, as amended."

32. The learned trial Judge erred in declining defendant's twenty-first point for charge which was as follows (Test. p. 553):

> "21. Since it appears that in a proceeding before the Interstate Commerce Commission the plaintiff made a claim for damages based upon the same grounds upon which damages are now claimed in this action, and that the Commission refused to award reparation, and on petition for reconsideration affirmed its refusal to award reparation in the nature of damages, the plaintiff cannot now recover such damages in this action."

33. The learned trial Judge erred in declining defendant's twenty-second point for charge which was as follows (Test. p. 554):

> "22. The amounts paid by The Pennsylvania Railroad Company to the Merchants Company are not evidence of the measure of plaintiff's damage, and if you find a verdict for the plaintiff you may not consider those payments in fixing the amount of your verdict."

34. The learned trial Judge erred in declining defendant's twenty-third point for charge which was as follows (Test. p. 554):

> "23. The difference between the total receipts of the plaintiff for handling shipments in its ware-

house business and the amount which Mr. Sullivan testified should have been received, does not represent a measure of the plaintiff's damage, if any, and if you find a verdict for the plaintiff you may not base it on such difference."

35. The learned trial Judge erred in declining defendant's twenty-fourth point for charge which was as follows (Test. p. 554):

"24. Since the total figure testified to by the plaintiff as representing the difference between the amount which it did receive and the amount which it should have received is based upon shipments received not only over the Pennsylvania Railroad but also over the Reading Railroad, by truck and by steamship, you may not base a finding of damage upon such total figure."

36. The learned trial Judge erred in declining defendant's twenty-fifth point for charge which was as follows (Test. p. 554):

"25. It appearing in this case and also in a prior proceeding between the same parties that like arrangements as these here complained of existed between other warehouses and other railways in the City of Philadelphia doing a business substantially equal to that of the plaintiff and defendant, it would be impossible for you to say in the absence of any affirmative evidence by the plaintiff, just how much, if any, damage was done to the plaintiff by these defendants and how much, if any, by other warehouses and other railroads who are not made parties defendant to this suit."

37. The learned trial Judge erred in declining defendant's twenty-sixth point for charge which was as follows (Test. p. 555):

"26. The detention of railroad cars prior to their arrival at the warehouses of the defendant, Merchants Warehouse Company, and the non-

charging of demurrage on said cars by the defendant, The Pennsylvania Railroad Company, is not an item of damage in this case and may not be considered by the jury in fixing the amount of a verdict, if the jury should determine upon a verdict for the plaintiff."

38. The learned trial Judge erred in declining defendant's twenty-seventh point for charge which was as follows (Test. p. 555):

"27. The burden of proving damages is on the plaintiff and unless you are satisfied by the preponderance of the credible evidence that the plaintiff has proved the amount of its damage, if any, which was caused by the defendants, the Merchants Company and The Pennsylvania Railroad Company, your verdict must be for the defendants."

39. The learned trial Judge erred in declining defendant's twenty-eighth point for charge which was as follows (Test. p. 555):

"28. You may not guess what, if any, damage the defendants, the Merchants Company and The Pennsylvania Railroad Company, caused the plaintiff, and unless there is evidence warranting you in finding a specific amount of damage caused by the defendants, your verdict must be for the defendants."

40. The learned trial Judge erred in declining defendant's twenty-ninth point for charge which was as follows (Test. p. 555):

"29. The plaintiff has attempted to measure its damage by showing the amount received from its patrons for handling freight shipped by rail and truck and also the amount which it believes it should have received upon what it terms 'normal rate basis'. Its only definition of such normal rate basis is that that is the amount which it should

have received in order to make a profit after deducting its costs of operation. There is no evidence that this so-called normal rate was ever received by anybody in the warehouse business in Philadelphia for doing this work and there is specific evidence that it was not. Under these conditions you are not justified in finding such so-called normal rate as any standard of comparison upon which to base a claim for damages."

41. The learned trial Judge erred in declining defendant's thirtieth point for charge which was as follows (Test. p. 556):

"30. Without the establishment of a prevailing rate basis, the plaintiff's theory of measuring damages by comparing the amounts actually received with the amounts which would have been received upon a normal rate basis must fail."

42. The learned trial Judge erred in declining defendant's thirty-first point for charge which was as follows (Test. p. 556):

"31. Under the evidence in this case there can be no verdict rendered by you against the defendants for more than nominal damages."

43. The learned trial Judge erred in declining defendant's thirty-second point for charge which was as follows (Test. p. 556):

"32. The defendant, The Pennsylvania Railroad Company, was subject to rulings of the Interstate Commerce Commission and under the rulings of that Commission, which had been announced prior to and including the date of the latest contract between the defendants, there was no disapproval of the arrangement entered into by the defendants under their contracts."

44. The learned trial Judge erred in declining defendant's thirty-third point for charge which was as follows (Test. p. 557):

"33. If the defendants in good faith believed that the Merchants Warehouse Company was the agent of The Pennsylvania Railroad Company and that they might lawfully enter into the contracts complained of in this suit, you may not find a conspiracy between the defendants and your verdict must be for the defendants."

45. The learned trial Judge erred in declining defendant's thirty-fourth point for charge which was as follows (Test. p. 557):

"34. Under all the evidence in the case your verdict must be for the defendants."

BARNES, BIDDLE & MYERS,
By JOHN HAMPTON BARNES,
JOHN HAMPTON BARNES,
Attorneys for The Pennsylvania Railroad Company.

OPINION

Sur Rule in Arrest of Judgment and for a New Trial.

(Filed May 8, 1934.)

Argued May 4, 1934.

DICKINSON, *J.*

This rule should be set down for re-argument.

DISCUSSION.

THE FACT SITUATION.

The significant facts in this cause have been reduced to few, indeed to one. One of the defendants is a railroad carrier; the other a public warehouseman. They made between them a contract, the purpose of

which was that the carrier should have all the freight shipments controlled by the warehouseman, and the latter should be made a freight agent and its warehouse a freight station of the carrier. The inducement to the carrier was that it expected to get freight shipments which might otherwise go by some other line. The inducement to the warehouseman was that it was benefited in several ways in its struggle with its competitors for warehousing business. The most important of these were that it received (1) large sums of money which its competitors did not; it received (2) this pay from the carrier for services the cost of which its competitors had themselves to bear, and (3) it was enabled to offer its patrons relief from the payment of demurrage charges which the patrons of other warehouses must incur. The carrier was compensated for the moneys paid the warehouseman and for demurrage charges not received, by having a share in the profits of the warehouseman. Beyond all doubt this arrangement was not only directly profitable to the favored warehouseman but it gave it possession of a weapon for use in its fight with its competitors for business. The carrier and the warehouseman were both selfishly interested in extending the business of the latter to the point, if possible of attainment, of an absolute monopoly of the whole warehousing business. The weapon thus supplied might or might not be used in the commercial welfare. If it were not, the warehouseman was directly benefited by the agency compensation received and by being able to increase its warehousing rates measured by the value of the demurrage charges saved to its patrons but this benefit to it was no damage to others. If the weapon were used one use made of it could be to cut rates below the cost price of its competitors and thus secure a monopoly. This was a damage to its competitors. The distinction between a benefit to the favored warehouseman and an injury to others is worthy of being kept in mind.

Appeal to the Commission.

An appeal was made to the Interstate Commerce Commission. This appeal had a three-fold purpose. (1) To have the agreement found to be and denounced as unlawful; (2) to obtain a "cease and desist" order, and (3) to be awarded reparation in damages. The appellants reached the first two objectives but damages were denied. The plaintiff was an active party to this proceeding.

We may interpolate here several comments. One is that a complaint is directed wholly against the carrier; another is that no action for damages because of the practice of a carrier can be entertained until the Commission has first declared it to be illegal, and the third is that the party damaged has the election to apply to the Commission for reparation or to the Courts and an appeal lies to the Courts from the ruling of the Commission except where purely negative. This means that the practice of a carrier can be made a cause of action only by a finding of illegality by the Commission, but when the practice has been thus condemned reparation in damages can be made by the Commission or the Courts at the election of the injured party. This it will be again noted applies only to a traffic charge or practice of the carrier. Independently of this remedy the injured party has another. The legislation known as the Sherman Anti-Trust Act denounces as unlawful all conspiracies in restraint of trade or to monopolize trade or business and gives a cause and a right of action to any one injured thereby.

The Question Presented.

This presents the main question raised by this Rule. The defendants have strenuously and confidently urged that the plaintiff having invoked the powers of the Commission to award it, the damages sustained be-

cause of the agreement between the defendants complained of as illegal, are bound by the finding of the Commission and cannot resort to another form of action to recover the same damages. This question was first raised by a demurrer. It was ruled against the defendants because, as a question of pleading, the two causes of action were wholly different. An unlawful conspiracy is as unlawful when an unlawful end is reached by the employment of lawful means as it is when a lawful end is reached through the employment of unlawful means. As we have seen, no damages can be awarded by the Commission nor by the Courts because of some practice of a carrier unless and until such practice was found by the Commission to be unlawful. It is this Commission found illegality which gives the right of action for damages under the Interstate Commerce Act. It is because of this that it has been held that no action can be maintained against a carrier because of any practice as such without this preliminary finding of unlawfulness.

Keogh v. Chicago, 260 U. S. 156.

Damages however may be recovered because of an unlawful conspiracy to monopolize without reference to any Commission finding and indeed without a carrier being concerned in it. That a carrier is among the defendants is in itself a mere coincidence without significance. The question was again raised on the application for a subpœna duces tecum to require the production of books of account and was again ruled against the defendants. Because of these rulings the plaintiff invokes the doctrine that the ruling made has become part of the law of the case. We accept the doctrine but deny its application. It will be noted that the question ruled was one of pleading. It concerned only the cause of action and the right of action. It did not concern the question of damages. There may be an injuria

absque damnum as well as damnum absque injuria. However clear the right of action if the damages have already been recovered they cannot again be awarded. If the right to damages has been submitted to a Court of competent jurisdiction, whether allowed or denied, the same right cannot be submitted in another action. A ruling that a party has a right of action is not a ruling that a particular claim for damages may be recovered. The same question was accordingly again raised at the trial as an obstacle to the recovery of the damages claimed. This trial ruling is now properly under review. It is that had the Commission awarded damages the same damages could not be again awarded in this action. The plaintiff is as much bound by a judgment against it as one in its favor. It cannot recover in a second action for damages which it has been ruled in a former action it cannot recover. All this is clear enough. The difficulty in reaching a satisfactory conclusion is due to the circumstances that there have been here two wrongs with overlapping damages. The question may in consequence be thus stated:

Is a judgment in one case against one defendant for one cause of action a bar to another action against other defendants for another cause of action? Such a question likewise admits of easy answer.

To squarely face the question submitted, it may be presented in this form:

1. An unlawful contract between a warehouseman and a carrier under which the favored warehouseman received preferential shipping treatment.

2. A proceeding before the Interstate Commerce Commission by warehouseman not so favored, for his damages resulting from the unlawful contract.

3. A finding that the claimant had not suffered damage.

Can the same claimant maintain an action against the favored warehouseman and the carrier for damages for an unlawful conspiracy under the Sherman Anti-Trust law? The question may be characterized as a close one. We frankly acknowledge that the strength of our conviction of the soundness of the view before entertained has been much shaken by the arguments addressed to us. It may be noted that the damages sought to be recovered in the conspiracy action are the same damages which, under the ruling of the Commission, might have been awarded by it. It will likewise be noted that the preferential shipping terms given the favored warehouseman, although an undoubted benefit to him, were not in themselves an injury to other shippers or even to public warehouseman who were shippers. The proceeding before the Commission was against the carrier. Before the damages now claimed could have been established it would have been necessary to show not merely that the preferential contract had been made by the carrier but also that it had been used by the favored warehouseman as a means of promoting a monopoly to the damage of the present plaintiff.

We do not see how the carrier could have been held answerable for damages resulting from such monopoly without proof of his participation in a conspiracy to promote it. Had this proof been admitted it would have transformed the proceeding before the Commission into an action under the Sherman Anti-Trust Act. The claimant might possibly have treated the contract as a preferential concession in the tariff rates and asked for the return of what it had thus overpaid. Had it offered this proof at the trial of this cause it would have been rejected as not bearing upon the damages flowing from any attempt to monopolize. This was the view we attempted to express in the charge to the jury.

Before announcing our adherence to it we think the question should be further argued. We have a higher measure of respect for the judgment of the experienced counsel concerned with this cause, who have given more time and thought to the question raised than we could possibly give, than we have for our own more or less hastily reached conclusions. None the less we are bound to follow our own judgment.

The senior counsel for the Warehouse Company began his terse and compact argument, which was limited to this question, by directing attention to what the plaintiff has asked the Commission to do and to the language of the Commission in refusing reparation. We feel the very great force of the argument which counsel has drawn from this. We agree that the Commission is presumed to have considered and passed upon every claim for damages which it was within its power to have awarded.

This brings into the discussion a question upon which we have not had the benefit of an expression of the views of counsel. It is whether the Commission might have awarded the same damages awarded by the jury.

It was arranged at the argument at Bar that we should limit our ruling to the questions discussed bearing upon the granting of a new trial, leaving the question of the judgment to be entered for further discussion, if this should be necessary.

In view of this we order the motion for a new trial and in arrest of judgment down for re-argument upon the question suggested in this opinion, with leave to counsel to discuss any questions which in their judgment should be discussed.

Re-argument ordered.

OPINION

In Re Motion in Arrest of Judgment and Rule for a New Trial Sur Re-argument.

Argued May 28th, 1934.

(Filed June 1, 1934.)

DICKINSON, *J.*

This cause was set down for re-argument upon one question because this had not been discussed by counsel for plaintiff. We gave leave, however, to rediscuss any questions which counsel might wish to reurge. We think the controlling question is the one herein discussed. Counsel for the defendants have however two other questions to which we will first advert.

1. The trial Court left to the jury the questions of (1) interstate transportation; (2) conspiracy, and (3) monopoly.

It is urged that these questions should have been determined by the Court. If the defendants had the right to binding instructions in their favor upon any of these questions, no judgment should be entered on the verdict. We were asked but refused to so rule. Whether the questions were properly for the Court or for the jury is of no importance if the verdict of the jury and the judgment of the Court are in accord.

We adhere to the rulings made and think these questions have been sufficiently discussed. We were asked to rule as defendants think we should have ruled. This was refused. The defendants are fully protected by the exception taken.

2. The second point made is that the jury applied a measure of damage which the plaintiff conceded was an improper measure.

If two are competitors for a trade and one receives a sum of money which the other does not, this money may be used to secure to the favored competitor a larger share of the trade than he would otherwise have secured. The unfavored competitor may be said to be hurt because the share of the trade which he secures is less than would otherwise be his. He thus loses the profits on what may be called lost business. There is however no way of determining the volume of the business thus lost. The plaintiff clearly admitted this. The complaint is that the jury computed damages which the plaintiff admitted could not be computed. An all sufficient answer to this complaint is that such measure of damages was disclaimed by the plaintiff, was not submitted to the jurors and was not applied by them. It may be added that the only criticism of the damages awarded as to adequacy comes from the plaintiff. The criticism is that the defendants informed the jury of the trebled damages given by the Sherman Anti-Trust Act and the jury discounted the judgment which would be entered on the verdict. The defendants do not complain of the sum awarded by the verdict.

3. As we have said the controlling question is whether the plaintiff having asked for and been given an award by the Interstate Commerce Commission can recover the same damages under the Sherman Act. The fact that the award was negative makes no difference.

The experienced counsel for plaintiff, having the courage of his convictions, has frankly made two admissions. He admits that the plaintiff made claim before the Commission for reparation, which included the same damages which the jury awarded, and further admits that if the Commission had the jurisdictional power to award the damages allowed by the jury, the plaintiff cannot recover in the instant case.

This reduces the question before us to the one of whether the Commission had this power. The defendants confidently assert that the question suggested has already been determined by the Courts. Before inquiring into these rulings, we may clear the ground by a few general observations.

There is a distinction between a cause of action or right of action and the damage sustained by a plaintiff or, as before stated, there may be injuria absque damnum as well as damnum absque injuria. The right of action given by the Commerce Acts is purely statutory. The conduct of common carriers engaged in interstate commerce is by those Acts subjected to supervision and acts found to be unlawful may be denounced and condemned. An injured party is given a right of action to recover reparation. There is no right of action until and only as unlawfulness is found. The Commission is given judicial or semi-judicial power to find, when the power is invoked, the reparation to which a complainant has the right. The jurisdiction of the Commission is restricted to common carriers and its awards so limited.

An injured party is given another right of action by the Sherman Anti-Trust law. The cause of action is wholly different from that of the right of action given by the Commerce Acts. It is given to recover damages flowing from an unlawful conspiracy. It is not restricted to carriers nor aimed at them as such. Any two or more persons may be conspirators. As before remarked, if one of the conspirators happens to be a common carrier, it is a mere coincidence. An overt act of the conspiracy may or may not have to do with the business of a carrier nor does it matter whether the act is in itself lawful or unlawful for, as before said, a conspiracy may be unlawful because of an unlawful end, although the means by which accomplished may in themselves not be unlawful.

This, we think, is the doctrine of Keogh v. Chicago, 260 U. S., 156. That case, it is true, was for a cause of action given by the Anti-Trust Act. The conspiracy charged however was a conspiracy among carriers to exact unlawful carrier rates. The Commission had ruled that the charges exacted were not unlawful. To permit a jury under the Sherman Act to find the rates charged to be unlawful would be to deny to the Commission the power to determine what rates were lawful.

The present action has a wholly different basis. It was for a charged conspiracy to monopolize the Interstate part of the warehousing business. The Commerce Acts had directly nothing to do with it. The conspiracy would have existed and the damage recovered have been wrought if the practice of the carrier had not been found to have been unlawful. The wrongfulness of the practice did not affect the existence of the conspiracy, its unlawful character or the damage suffered by the plaintiff. The Commission could award damages only against the carrier qua carrier and for some practice as carrier condemned as unlawful. It would have no jurisdiction to award damages against conspirators who were not carriers but in an unlawful conspiracy to do some act with which the Commerce Acts did not concern themselves. The fact that one of the conspirators was a carrier would not confer jurisdiction.

Another case upon which defendants rely is that of I. C. C. v. United States, 289 U. S., 385. Directly it does not touch the question now presented. There had been a proceeding before the Commission and a "cease and desist order" directed to issue. The complainant had also asked for reparations which the Commission refused to award. Application was made for a mandamus to compel the Commission to make an award. This the Court refused, holding the award

made to be a judicial or semi-judicial judgment. The duty of the Commission was discussed and its scope explained. The discussion concludes with the statement that "damages for discrimination denied by the Commission are not recoverable elsewhere". Judicial utterances are not to be interpreted as abstractions but always in the light of the fact situation to which they relate. The Commission was being asked to make an award. It is fair to assume that it had the jurisdictional power to make or refuse to make the award asked. All the case rules is that its judgment could not be coerced nor could any other Court make for it an award which it refused to make. This is far from ruling that one who has suffered damages, through an unlawful conspiracy cannot recover for the injury done him because the Interstate Commerce Commission has found that he suffered no loss from the exaction of an unlawful rate by a common carrier. If the judgment of the Commission concludes the plaintiff, it would seem to be on the res adjudicata principle. It will be noted as perhaps having some significance that the reference in the discussion is never to this principle but always to that of estoppel.

Another case upon which the defendants rely is that of Louisville v. Ohio, 242 U. S., 288. Here again the reliance is not upon the ruling made but upon general phrases which appear in the opinion. There had been an award by the Commission and reparation allowed for an unlawful freight rate exacted. A suit was brought to recover business losses. This was based on the Commerce Act not the Sherman Act. The opinion, it is true, expresses the thought that the Commission might have awarded reparation for "damages to (the complainant's) business", but this is qualified by the statement that it was for damages "following" the exaction of the unlawful freight rate. The language emphasized by the defendants is further

qualified by the concluding words of the opinion, "If at a new trial the plaintiff can prove that the defendant . . . caused it other damage not attributable to the overcharge of freight, our decision does not prevent a recovery".

It is further to be observed that the judgment in the Court below was reversed because of elements of damage which were improper having been allowed and the case directed to be retried. The case cannot be properly viewed as supporting the proposition for which the defendants stand.

Still another case is that of Penna. v. International, 230 U. S., 184. The case may be misread because not well reported. It was based upon the Commerce Act because of preferential rates. No damage was proven, the plaintiff relying solely upon the fact that preferential rates had been given. If the case stands for the broad proposition that what is of benefit to one shipper is not necessarily an injury to another, it is in line with numerous other cases. That it will not bear the reading given to it by the defendants is clear from Meeker v. Lehigh, 236 U. S., 429, in which it stated that the case does not so rule.

Without further expansion of an already overlong discussion, we state the conclusion reached. It is that the award or refusal of the Commission to award reparation for the exaction of unlawful freight rates by a carrier is not a bar to an action by the same complainant against the same carrier and others under the Sherman Act for "damage to his business" through an unlawful conspiracy to monopolize the business in which the complainant is engaged.

We stand for the further proposition that a practice of a carrier who is a co-conspirator may be used as an instrument to advance the ends of an unlawful conspiracy, for the damage done by which the conspirators are responsible, without regard to whether

the practice of the carrier as such is in itself lawful or unlawful.

The action here is for damages suffered through an unlawful conspiracy. It is not brought under the Commerce Acts and those Acts have to do with it only incidentally.

The Rule for a new trial is discharged, and the motion in arrest of judgment denied, with leave to plaintiff to move for judgment on the verdict in accordance with the Sherman Anti-Trust Act, with costs, and counsel fees.

DEFENDANT, PENNSYLVANIA RAILROAD COMPANY'S EXCEPTION TO THE REFUSAL OF THE COURT TO GRANT ITS MOTION FOR A NEW TRIAL.

(Filed June 12, 1934.)

And Now, June 12, 1934, comes the defendant, The Pennsylvania Railroad Company, and asks that the Court grant it an exception to the refusal of its motion for a new trial of the above case.

The Pennsylvania Railroad Company,
By Its Attorney,
John Hampton Barnes.

ORDER.

(Filed June 12, 1934.)

And Now, June 12, 1934, the exception is granted to defendant, The Pennsylvania Railroad Company, to the refusal of the Court of its motion for a new trial of the above case.

O. B. Dickinson, *J.*

DEFENDANT, MERCHANTS WAREHOUSE COMPANY'S EXCEPTION TO THE REFUSAL OF THE COURT TO GRANT ITS MOTION FOR A NEW TRIAL.

(Filed June 12, 1934.)

And Now, June 11, 1934, comes the defendant, Merchants Warehouse Company, and asks that the Court grant it an exception to the refusal of its motion for a new trial of the above case.

Merchants Warehouse
Company,
By Its Attorney,
Robert T. McCracken.

ORDER.

(Filed June 12, 1934.)

And Now, June 12, 1934, the exception is granted to defendant, Merchants Warehouse Company, to the refusal of the Court of its motion for a new trial of the above case.

O. B. Dickinson, *J.*

MOTION FOR JUDGMENT AND TO TREBLE DAMAGES.

(Filed March 29, 1934.)

And Now, March 29, 1934, the jury having assessed plaintiff's damages in the above entitled case at $136,125, plaintiff moves the Court to enter judgment in favor of the plaintiff and against the defendant for threefold that amount, to wit, $408,375, together with the cost of suit including a reasonable attorney's

fee to be hereafter assessed by the Court, in accordance with the Act of July 2, 1890, c. 647, 26 Stat. at L. 209, Section 7, and the Act of October 15, 1914, c. 323, 38 Stat. at L. 731, Section 4, 15 U. S. C. Section 15.

(Sgd.) T. R. WHITE,
Attorney for Plaintiff.

DEFENDANTS' ANSWER TO PLAINTIFF'S MOTION FOR JUDGMENT AND TO TREBLE DAMAGES.

(Filed April 3, 1934.)

AND Now, April 3, 1934, come the defendants above named by their respective attorneys, John Hampton Barnes, Esq., and Robert T. McCracken, Esq., and in answer to the plaintiff's motion for judgment and to treble damages state:

1. Plaintiff's motion for judgment should not be considered by the Court pending the disposition of the defendants' motions for a new trial.

2. Judgment, if and when entered, should be in the amount of the jury's verdict, and should not be threefold that amount, because prior to trial the books and records of the defendant, The Pennsylvania Railroad Company, were opened to the plaintiff pursuant to Court order, thereby precluding the penalty of threefold damages.

3. Judgment, if and when entered, should be in the amount of the jury's verdict, and should not be threefold that amount, because the plaintiff's proofs of damages were too uncertain, vague and remote to permit any trebling thereof.

4. Judgment, if and when entered, should be in the amount of the jury's verdict, and should not be

threefold that amount, because the good faith of the defendants is unimpeached and there is admittedly an entire lack of evidence of any guilty intent on their part justifying exemplary damages by trebling the jury's verdict.

5. Neither reasonable attorney's fees nor costs should be awarded for the same reasons as above stated as the reasons why the Court should not enter judgment for treble the jury's verdict.

JOHN HAMPTON BARNES,
Attorney for Pennsylvania Railroad Company.
ROBERT T. MCCRACKEN,
Attorney for Merchants Warehouse Company.
Defendants Above Named.

DEFENDANTS' SUPPLEMENTAL ANSWER TO PLAINTIFF'S MOTION FOR JUDGMENT AND TO TREBLE DAMAGES.

(Filed June 21, 1934.)

AND Now, June 21, 1934, come the defendants above named, by their respective attorneys, John Hampton Barnes and Robert T. McCracken, Esq., and in answer to plaintiff's motion for judgment and to treble damages state:

Judgment, if and when entered, should be in the amount of the jury's verdict and should not be for threefold that amount, because section 7 of the Sherman Act, approved July 22, 1890, as amended, superseded or supplemented by the Act of Congress of October 15, 1914, section 4, Revised Statutes 731, provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee,"

there being no authority in the statute permitting the Court to treble the amount of the jury's verdict, it being within the power of a jury only to award threefold damages sustained.

JOHN HAMPTON BARNES,
Attorney for The Pennsylvania Railroad Company.
ROBERT T. MCCRACKEN,
Attorney for Merchants Warehouse Company.

SUPPLEMENTAL ANSWER OF DEFENDANT, PENNSYLVANIA RAILROAD COMPANY, TO PLAINTIFF'S MOTION FOR JUDGMENT AND TO TREBLE DAMAGES.

(Filed April 6, 1934.)

AND Now, April 6, 1934, Pennsylvania Railroad Company, one of the above-named defendants, by its attorney, John Hampton Barnes, Esq., files this its supplemental answer to plaintiff's motion for judgment and to treble damages:

1. Judgment, if and when entered, should be in the amount of the jury's verdict and not threefold that amount and counsel fee, because prior to the trial,

upon petition of plaintiff and answer of defendant, denying the right of the plaintiff to production of its books and papers at the trial, the defendant was required to produce the same and submit them to the plaintiff, and the information thus obtained was admitted in evidence for the plaintiff at the trial over the objection of the defendant.

JOHN HAMPTON BARNES,
Attorney for Pennsylvania Railroad Company.

PETITION FOR ALLOWANCE OF COUNSEL FEE.

(Filed April 21, 1934.)

Your petitioners, John J. Hickey, Thomas Raeburn White and White, Schnader, Maris & Clapp, Esquires, respectfully petition your Honorable Court to allow them a reasonable compensation for their services rendered as attorneys for the plaintiff, in the preparation, institution and trial of the above-entitled cause, in accordance with the Act of July 2, 1890, c. 647, 26 Stat. at L. 210, § 7 and the Act of October 15, 1914, c. 323, 38 Stat. at L. 731, § 4, 15 U. S. C. § 15, and respectfully show to the Court that:

1. This is an action for treble damages under the Sherman Anti-trust Act. Counsel for plaintiff have been actively and almost continuously engaged in its preparation and disposition since June of 1931. The facts upon which it is based are of a complicated nature and a thorough investigation both of the facts and of the applicable law was essential to a preliminary determination as to the plaintiff's right of action.

2. In order to determine the theory on which the case was to be tried and what items of damage were

to be claimed, it was necessary for your petitioners thoroughly to familiarize themselves with every aspect of the case, including certain technical ones. It was necessary to make a study of railroad routes, traffic movements, sources of warehouse freight, railroad classifications, tariffs and practices, the multiplicity of services performed by public warehouses, the relationship between warehouse services and rates, and the abnormal warehouse conditions in the Philadelphia District. In order to do this it was necessary for your petitioners to employ and confer with experts and direct their special studies of this matter. It was also necessary for your petitioners to supervise the preparation of a very elaborate computation of damages by the plaintiff.

3. It was necessary for your petitioners carefully to prepare a statement of claim, to institute action and to arrange for service of process and pleadings.

4. A rule for a more specific statement of claim having been filed, it was necessary for your petitioners to prepare a brief in reply thereto and to argue the motion.

5. A statutory demurrer having been filed, it was necessary for your petitioners to prepare a brief in opposition thereto and to argue the demurrer.

6. Preliminary to trial, it was necessary for your petitioners to prepare a rule for the production of certain books and papers in the possession of one of the defendants; to prepare a brief in support of the rule and to argue the same. It was further necessary for your petitioners to arrange for and supervise the compilation of the information obtained pursuant to that order.

7. It was necessary for your petitioners to interview witnesses, to collect and study many exhibits, to examine many points of law and generally to make a thorough preparation for trial with a view to simplifying a complicated fact situation and shortening the trial.

8. The actual trial of the case consumed six full days and a part of the seventh, during which time at least three attorneys were constantly present in the court room. The trial would normally have taken much longer had it not been for the careful preparation aforementioned. The trial resulted in a verdict in favor of the plaintiff in the sum of $136,125, which trebled in accordance with law, will give judgment in favor of plaintiff for $408,375. During the course of the trial many questions of procedure and the admissibility of evidence were raised which required investigation by attorneys in your petitioners' office in addition to those actually engaged in the trial of the case.

9. Your petitioners have prepared a motion to enter judgment in treble the amount of damages assessed by the jury, in accordance with the Act of Congress and have prepared a brief in support of said motion.

10. Motions for new trial having been filed by both defendants, your petitioners have had to make a thorough review of the lengthy testimony and to prepare a brief answering over forty points assigned as error.

11. All of the foregoing services have necessitated many hours' work by experienced attorneys, and have involved great responsibility.

12. Your petitioners aver that they are entitled to a reasonable compensation for their services rendered as aforesaid and suggest that the sum of $75,000 would be a minimum reasonable fee.

WHEREFORE your petitioners pray this Honorable Court to make such allowance to them as attorneys for the plaintiff in this case as may to it seem meet and proper, taking into consideration the time, labor and services performed and the amount involved, and that judgment be entered against the defendants for the amount of said allowance in addition to damages and costs, in accordance with the Act of Congress aforesaid.

Respectfully submitted,

JOHN J. HICKEY,
THOMAS RAEBURN WHITE,
WHITE, SCHNADER, MARIS & CLAPP,
Attorneys for Plaintiff.

DEFENDANTS' ANSWER TO PETITION FOR ALLOWANCE OF COUNSEL FEE.

(Filed May 3, 1934.)

AND NOW, May 3, 1934, come the defendants above named by their respective attorneys, John Hampton Barnes, Esquire, and Robert T. McCracken, Esquire, and in answer to the petition for allowance of counsel fee state:

1. Respondents aver that the facts alleged in paragraph 1 of the petition respecting the activities and services of counsel since June, 1931, and the means of proof of said facts are within the exclusive knowledge and control of counsel for the plaintiff; and therefore respondents demand proof of such alleged

facts by the plaintiff and/or its counsel. Respondents are informed, believe and therefore aver that little or no work was required of counsel in the preparation of the above-entitled suit for trial because the subject matter of said suit formed the basis of three separate proceedings before the Interstate Commerce Commission, in which the plaintiff above named was a party complainant and John J. Hickey, Esquire, was counsel for the complainants. All of the issues of fact raised by the above-entitled suit were raised in the prior proceedings, which were commenced on June 1, 1928 and were actively litigated up to and including May 1931; and the preparation and trial of said prior proceedings necessarily included within its scope the preparation of the above-entitled suit for trial. Because of the size of the record in said prior proceedings, which fills two printed volumes, the same is not attached to this answer as an exhibit; but the respondents reserve the right to make such use of said record as the occasion demands at a hearing upon this petition and answer.

2. Respondents aver that the facts alleged in paragraph 2 of the petition respecting the activities and services of counsel and the means of proof thereof are within the exclusive knowledge and control of counsel for the plaintiff; and therefore respondents demand proof of such alleged facts by the plaintiff and/or its counsel. Respondents repeat the averments in paragraph 1 of this answer and again allege that little or no further work was required of counsel for the plaintiff over and above that expended in the preparation and trial of the prior Interstate Commerce Commission proceedings. Respondents aver that as a matter of law the petitioners may not recover a fee for their services in the prior proceedings under the guise of a fee for alleged services in the

above-entitled suit. Respondents further aver that an examination of the printed record in the prior proceedings discloses that the same included every issue raised by the present suit.

3-5. All of the averments of paragraphs 3-5, both inclusive, are admitted. In further answer, respondents aver that none of the services required of counsel for the plaintiff in preparing and arguing the said pleadings and motions were in any manner extraordinary or unusual so as to justify the payment of other than the usual fair and reasonable counsel fee.

6. Respondents aver that the facts alleged in paragraph 6 of the petition respecting the activities and services of counsel and the means of proof thereof are within the exclusive knowledge and control of counsel for the plaintiff; and therefore respondents demand proof of such alleged facts by the plaintiff and/or its counsel. Respondents repeat the averments in paragraph 1 of this answer and again allege that the great bulk of information sought by the plaintiff's rule had been voluntarily produced by the defendants in the prior proceedings, was already known to plaintiff's counsel and required little or no further work.

7. Respondents aver that the facts alleged in paragraph 7 of the petition respecting the activities and services of counsel and the means of proof thereof are within the exclusive knowledge and control of counsel for the plaintiff; and therefore respondents demand proof of such alleged facts by the plaintiff and/or its counsel. Respondents repeat the averments in paragraph 1 of this answer and again aver that little or no further work was required of counsel for the plaintiff over and above that expended in the preparation and trial of the prior Interstate Commerce Commission proceedings, for which prior services no

fee may be collected in the present suit. Respondents further aver that the simplification and shortening of the trial of the present suit is attributable solely to the voluntary action of the defendant, the Pennsylvania Railroad Company, in co-operating with and giving free access to the accountants sent by the plaintiff or its counsel to examine and verify certain records of the said defendant.

8. Respondents aver that those allegations in paragraph 8 of the petition which deal with the activities and services of counsel outside the courtroom and the means of proof of such allegations are within the exclusive knowledge and control of counsel for the plaintiff; and therefore respondents demand proof of such alleged facts by the plaintiff and/or its counsel. Respondents repeat the averments of paragraph 1 of this answer and again aver that little or no further work was required of counsel for the plaintiff over and above that expended in the preparation and trial of the prior Interstate Commerce Commission proceedings, for which prior services no fee may be collected in the present suit. Respondents further aver that the trial of the present suit was shortened solely by reason of the voluntary action of the defendant, the Pennsylvania Railroad Company, in opening its books and records in advance of trial as above set forth; that any trebling of damages under the Sherman Act has nothing to do with the services of counsel; and that the questions of procedure and the admissibility of evidence raised during the trial were such as should have been foreseen, studied and answered by counsel in the ordinary preparation for trial and should not have involved the services of counsel other than those actually engaged in the trial.

The remaining allegations of paragraph 8 which deal with the actual trial in open court are a matter of record and require no answer.

9-10. All of the averments of paragraphs 9 and 10 of the petition are admitted. In further answer, respondents aver that the preparation and argument of the said motions involve no extraordinary or unusual services of counsel so as to justify the payment of other than the usual fair and reasonable counsel fee.

11. Respondents aver that the facts alleged in paragraph 11 of the petition and the means of proof thereof are within the exclusive knowledge and control of counsel for the plaintiff; and therefore respondents demand proof of such alleged facts by the plaintiff and/or its counsel. Respondents repeat the averments in paragraphs 1, 2, 7 and 8 of this answer and again aver that little or no work was required of counsel in preparing the above-entitled suit for the several reasons above stated.

12. Respondents deny all the averments of paragraph 12 of the petition; and aver on the contrary that a fair and reasonable fee for such services as were required of counsel for the plaintiff over and above the services rendered in the prior Interstate Commerce Commission proceedings would be according to Philadelphia standards a minimum of $5000, and a maximum of $10,000, and the exact amount of the fee between said limits will depend upon the proofs adduced by the plaintiff and/or the petitioners respecting the services of counsel.

13. Respondents aver that there is now pending before this Court a companion suit brought by Walter A. Bailey, trading as Bailey Warehouses v. Pennsylvania Railroad Company and Merchants Warehouse Company as of March Term 1932, No. 16,772, which suit, like the above-entitled suit, grows out of the subject matter of the prior Interstate Commerce Commis-

sion proceedings, and in which suit counsel for the plaintiff represents the plaintiff, Walter A. Bailey. The pleadings and the pre-trial motions and arguments in the present suit and in the companion suit have always been treated and argued as one suit; and the services of counsel in preparing the present suit for trial are to all intents and purposes the same services as required in preparing the companion suit. Respondents therefore aver that in fixing a counsel fee in the present suit, the Court should take into consideration and give effect to the fact that the services of counsel in the present suit cannot be disassociated from the services of counsel in the companion suit.

14. Respondents aver that the allowance of a counsel fee under the Sherman Act is in the nature of a penalty; and further that in view of the fact that the books and records of the defendant, the Pennsylvania Railroad Company, were opened and made accessible to the plaintiff in advance of trial and thereby aided the plaintiff in its recovery under the Sherman Act, since said books and records were used at the trial by the plaintiff, the allowance of a counsel fee in the present suit is thereby precluded and should be denied as a matter of law.

WHEREFORE, respondents aver that the petition for the allowance of counsel fee should be dismissed as a matter of law; and accordingly pray this Court to deny and dismiss the said petition.

JOHN HAMPTON BARNES,
Counsel for Defendant, The Pennsylvania Railroad Company.
ROBERT T. MCCRACKEN,
Counsel for Defendant, Merchants Warehouse Company.

OPINION

Sur Rule for Judgment for Treble Damages and for Allowance of Counsel Fees.

Argued June 20, 1934.

(Filed June 22, 1934.)

DICKINSON, *J.*

The rule should be made absolute.

DISCUSSION.

The disposition of this Rule may be premised by a statement. The Act of Congress uses the phrase "shall recover". At the trial the question suggested itself whether the jury should be instructed to treble their finding of damages or whether this should be done by the Court in entering judgment on the verdict. In the latter case the question became what should be said to the jury on the subject. If they were told that the sum for which they found would be trebled they might anticipate this by dividing what would otherwise be their verdict by three. This is what counsel for plaintiff think was in a measure done. If they were not instructed they might treble the found damages, resulting in the trebled damages being again trebled by the Court. Counsel were called into consultation at which all concurred in the trial Judge instructing the jury to find the actual damages, saying nothing about the trebling. This means that the motion for trebled damages should be allowed.

This brings us to the question of the allowance of counsel fees. The language of the Act again is that the plaintiff "shall recover." This suggests a similar question to the former. Should the allowed counsel fees be included in the judgment or fixed to be in-

cluded in the taxed costs. Counsel were again taken into consultation, and the opinion expressed that the counsel fees should be taxed as costs. This is meant only to explain why we have not gone into or even considered these questions of the formalities. It is not meant as a waiver of any rights by either party.

This takes us to the question of the sum to be allowed for counsel fees. There are several viewpoints which may be taken. The practical features of the case tie themselves up with the practice of the carrier defendant condemned by the Commerce Commission. The labors of counsel in that proceeding was a preparation for and greatly in ease of their labors in the instant case and in that sense the two were one.

We must be mindful of the circumstances that we have held in the present case that it and the Interstate Commerce proceedings are based upon wholly different and independent causes of action. Another circumstance is that the right to an award of counsel fees is given only in the present action and is not given by the Commerce Acts. These and other considerations make it compelling that we exclude the services of counsel before and in preparation for the Commerce proceeding and restrict the allowance to services rendered in the Sherman Act case.

We think we should have further in mind that counsel bringing and trying the monopoly case have the benefit and use of the record in the proceeding before the Commission, and that their labors are lightened thereby. The meaning of this feature of the Act must be further gathered from its purpose. It is not meant wholly as a gratuity to a plaintiff but as a benefit to the public who suffer quite as great an injury from a monopoly as the plaintiff does damage. The appeal of a plaintiff who, in addition to being recompensed for his actual damages, had been given a bonus, as here, of upwards of a quarter million dam-

ages, to be relieved of the payment of his counsel fees, would not be a very moving one. It would be thought he could pay his counsel. It must be remembered that the provisions of the Act must be general. Damages from a monopoly to a competitor are proverbially difficult of proof and may in many cases exceed what is proven. Hence the trebling. It is to the public interest that conspiracies to monopolize be put down. There may be many hard fought cases in which the services rendered by counsel are exacting and protracted and yet the recovery may not be large. The expense of the litigation is certain to be incurred; the sum recovered is uncertain in amount. The policy of the law is in consequence to assure injured persons against expenses to be incurred so that they will not from fear of such loss be deterred from bringing actions which it is to the public interest should be brought. The sum recovered, if small, does not measure the value of the services rendered by counsel nor does it measure, as it largely would, the value of such services as between client and counsel, when the recovery is large. It must not be forgotten in the latter case that it is the defendant who pays. We do not mean to imply by this that the importance of the case measured by the sum in controversy does not affect the compensation of counsel. It properly would. If, for illustration, it were possible to fix counsel fees in advance, counsel who were asked to render services in a case in which the damages sought to be recovered were fairly estimated at $600,000, they would reasonably estimate the value of their services at a higher figure than if there was only $10,000 involved. We think a prospective estimate enters into the question. The at least possibility that further services before one or possibly two appellate courts may be rendered, we think may also be in mind in making the estimate. There is still another feature. A case may be of such importance as that one

counsel might prepare and try it; another, as did this case, call for the services of more than one counsel. There are so many elements which enter into any estimate which is fair to the plaintiff and fair to the defendant as well, that it is very difficult to fix a just sum. The course of litigation, the nature of the calls made upon counsel and the time given to the case all enters into it.

Having in mind all the elements we have fixed counsel fees in this case at the sum of Twenty-seven Thousand Dollars ($27,000). This by no means measures the value to the clients of the services of counsel in this case and what preceded its institution or what counsel should receive, but it does measure, as best we can, what counsel fees should be taxed as costs against the defendants.

The Rule for judgment is made absolute, and judgment may be entered for the sum of Four Hundred and Ten Thousand, Three Hundred and Thirty-eight and Eighty-one Hundredths Dollars ($410,338.81), assessed as follows:

Amount of verdict	$136,125.00
Interest from March 27th, 1934 to date	1,963.81
Additional sum for trebled damages	272,250.00
Total judgment	$410,338.81

Counsel fees are fixed at the sum of $27,000 to be taxed as part of the costs, the judgment being with costs added.

PRÆCIPE FOR JUDGMENT.

(Filed June 25, 1934.)

To the Clerk:

Kindly enter judgment for the plaintiff and against the defendants in the sum of $410,338.81 together with costs including a counsel fee of $27,000.

(Sgd.) WHITE, SCHNADER, MARIS & CLAPP.

June 25, 1934.

JUDGMENT.

(Filed June 25, 1934.)

Before DICKINSON, *J.*

AND NOW, June 25, 1934, in accordance with the verdict, the opinion of the Court and by præcipe filed, judgment in the sum of four hundred ten thousand three hundred thirty-eight and 81/100 ($410,338.81) dollars, together with costs including counsel fee of $27,000, is hereby entered in favor of plaintiff, Terminal Warehouse Company, and against the defendants, Pennsylvania Railroad Company and Merchants Warehouse Company.

By THE COURT.

Attest:

E. G. JOHNSON,
Deputy Clerk.

DEFENDANT, PENNSYLVANIA RAILROAD COMPANY'S EXCEPTION TO ORDER TREBLING THE AMOUNT OF THE VERDICT AND ALLOWING A COUNSEL FEE.

(Filed July 2, 1934.)

And Now, July 2, 1934, comes the defendant, The Pennsylvania Railroad Company, and asks that the Court grant it an exception to the order entered June 22, 1934, making absolute plaintiff's rule for judgment in treble the amount of the verdict and allowing plaintiff a counsel fee in the sum of $27,000 to be taxed as part of the costs, and entering judgment for the plaintiff in the sum of $410,338.81.

The Pennsylvania Railroad Company,
By its Attorney,
John Hampton Barnes.

ORDER.

(Filed July 2, 1934.)

And Now, July 2, 1934, an exception is granted to defendant, The Pennsylvania Railroad Company, to the order entered June 22, 1934, making absolute plaintiff's rule for judgment in treble the amount of the verdict and allowing plaintiff a counsel fee in the sum of $27,000, to be taxed as part of the costs, and entering judgment for the plaintiff in the sum of $410,338.81.

O. B. Dickinson,
J.

EXCEPTIONS OF THE DEFENDANT, MERCHANTS WAREHOUSE COMPANY, TO TREBLING OF DAMAGES, ALLOWANCE OF COUNSEL FEE, AND ENTRY OF JUDGMENT.

(Filed July 2, 1934.)

And Now, to wit, July 2, 1934, comes the defendant, Merchants Warehouse Company, and asks that the Court grant it the following exceptions:

1. An exception to the Court's action in making absolute the plaintiff's rule for judgment for treble damages and for allowance of counsel fees; and the trebling by the Court of damages in the total sum of $410,338.81 and the allowance and fixing of counsel fees in the sum of $27,000, to be taxed as part of the costs.

2. The entry of judgment in the sum of $410,338.81 together with counsel fees of $27,000, to be taxed as part of the costs.

Merchants Warehouse Company,
By its Attorney,
Robert T. McCracken.

ORDER.

(Filed July 2, 1934.)

And Now, July 2, 1934, the above exceptions are granted to the defendant, Merchants Warehouse Company, to the trebling of damages, allowance of counsel fees, and entry of judgment.

O. B. Dickinson,
J.

ORDER EXTENDING TIME FOR PRESENTING AND SEALING BILL OF EXCEPTIONS AND EXTENDING TERM.

(Filed April 3, 1934.)

AND Now, to wit: April 3, 1934, on motion of John Hampton Barnes, Esq., counsel for Pennsylvania Railroad Company, and Robert T. McCracken, Esq., counsel for Merchants Warehouse Company, the defendants above named, and it appearing that the defendants' motions for a new trial in the above-entitled cause are now pending before the Court, it is hereby ORDERED and DECREED that the time for presenting and sealing their bill of exceptions shall be extended so that the said defendants shall have ten days after the handing down by the Court of its adjudication sur the pending motions for a new trial within which to present their proposed bills of exceptions in the above-entitled cause and shall have another twenty days thereafter for the sealing of their proposed bills of exceptions herein and further that the present term of court shall be deemed to have been likewise extended for that purpose.

By THE COURT,

DICKINSON,

J.

ORDER FURTHER EXTENDING TIME FOR PRESENTING AND SEALING BILL OF EXCEPTIONS AND FURTHER EXTENDING TERM.

(Filed June 6, 1934.)

AND Now, to wit, June 6, 1934, on motion of John Hampton Barnes, Esq., counsel for The Pennsylvania Railroad Company, and Robert T. McCracken, Esq., counsel for Merchants Warehouse Company, the defendants above named, and it appearing by the adjudication filed by this Court on June 1, 1934, sur reargument of the defendants' motions for a new trial that the said motions for a new trial were denied with leave to the plaintiff to move for judgment on the verdict in accordance with the Sherman Anti-Trust Act with costs and counsel fee and it further appearing that the Court has fixed Wednesday, June 20, 1934, at 10 A. M. for a hearing on the plaintiff's motion for judgment and to treble damages and the defendants' answer thereto and also on the plaintiff's petition for allowance of counsel fee and the defendants' answer thereto, it is hereby ORDERED AND DECREED that the time for presenting and sealing the defendants' bill of exceptions shall be further extended so that the said defendants shall have ten days after the handing down by this Court of its adjudication sur the pending motion for judgment and to treble damages and the pending motion for allowance of counsel fee and after the entry of judgment pursuant to said adjudication, within which to present their proposed bill of exceptions in the above-entitled cause and shall have another twenty days thereafter for the sealing of their proposed bill of exceptions herein; and further that the present term of court shall be deemed to have been likewise extended for that purpose.

By THE COURT,

O. B. DICKINSON,

J.

SUPPLEMENTAL ORDER FURTHER EXTENDING TIME FOR PRESENTING AND SEALING EXCEPTIONS AND FURTHER EXTENDING TERM.

(Filed July 5, 1934.)

And Now, to wit, July 5, 1934, on motion of John Hampton Barnes, Esquire, counsel for The Pennsylvania Railroad Company, and Robert T. McCracken, Esquire, counsel for Merchants Warehouse Company, it is hereby Ordered and Decreed that the time for presenting and sealing the defendants' bill of exceptions shall be further extended so that the said defendants shall have until July 25, 1934, within which to present their proposed bill of exceptions in the above-entitled cause and shall have another twenty days thereafter for the sealing of their proposed bill of exceptions; and further that the present term of court shall be deemed to have been likewise extended for that purpose.

By THE COURT,

Oliver B. Dickinson,

J.

PETITION FOR ALLOWANCE OF APPEAL.

(Filed August 15, 1934.)

To the Honorable Oliver B. Dickinson, Judge of the said Court:

Your petitioners, The Pennsylvania Railroad Company and the Merchants Warehouse Company, by their respective attorneys, John Hampton Barnes, Esquire, and Robert T. McCracken, Esquire, pray that they may be allowed to take an appeal from the judg-

ment entered in the above-entitled cause on June 25, 1934, to the United States Circuit Court of Appeals for the Third Circuit for the reasons specified in the assignment of errors which is filed herewith. Your petitioners are the defendants in the said cause.

Your petitioners aver that counsel for the plaintiff has agreed to an appeal bond in the principal sum of $500,000; and therefore pray that an order be made fixing the bond to be given and furnished by your petitioners upon such an appeal at $500,000, and that upon giving such security all further proceedings in this court be stayed and superseded until the determination of said appeal by the Circuit Court of Appeals for the Third Circuit.

Dated: August 15, 1934.

JOHN HAMPTON BARNES,
Attorney for The Pennsylvania Railroad Company.
ROBERT T. MCCRACKEN,
Attorney for Merchants Warehouse Company,
Petitioners.

ACKNOWLEDGMENT OF SERVICE AND APPROVAL OF BOND.

(Filed August 15, 1934.)

As counsel for the Terminal Warehouse Company, the above-named plaintiff, I hereby acknowledge service of a copy of the annexed petition for allowance of appeal: and I hereby agree that the appeal bond may be fixed in the sum of $500,000.

WHITE, SCHNADER, MARIS & CLAPP,
Attorneys for Terminal Warehouse Company.

ORDER ALLOWING APPEAL, WITH SUPERSEDEAS.

(Filed August 15, 1934.)

AND Now, to wit, August 15, 1934, the foregoing petition for allowance of appeal to the United States Circuit Court of Appeals for the Third Circuit is hereby granted and the appeal is allowed; and upon the petitioners filing a bond in the sum of $500,000, with sufficient surety and conditioned as required by law, the same shall operate as a supersedeas of the judgment made and entered on June 25, 1934, in the above cause and shall suspend and stay all further proceedings in this Court until the termination of said appeal by the said Circuit Court of Appeals.

O. B. DICKINSON,
J.

DEFENDANTS' ASSIGNMENT OF ERRORS.

(Filed August 15, 1934.)

AND Now, to wit, August 15, 1934, come the defendants in the above-entitled cause of action and file the following assignment of errors upon which they will rely upon their prosecution of the appeal in said cause of action from the judgment of this Court, entered on June 25, 1934, namely:

1. The Court erred in overruling the first ground of demurrer interposed by the defendant, The Pennsylvania Railroad Company, in its separate affidavit of defense in the nature of a demurrer to the plaintiff's statement of claim, thereby deciding that the Court had jurisdiction upon the facts as set out in the statement of claim under the Acts of Congress of

July 2, 1890, c. 647, secs. 1 and 2, and October 15, 1914, c. 323, sec. 4.

2. The Court erred in overruling the second ground of demurrer interposed by the defendant, The Pennsylvania Railroad Company, in its separate affidavit of defense in the nature of a demurrer to the plaintiff's statement of claim, thereby deciding that the averments of fact set forth in the plaintiff's statement of its cause of action constituted a cause of action under the provisions of the aforesaid Acts of Congress.

3. The Court erred in overruling the third ground of demurrer interposed by the defendant, The Pennsylvania Railroad Company, in its separate affidavit of defense in the nature of a demurrer to the plaintiff's statement of claim, thereby deciding that the provisions of the agreements referred to in paragraph 9 of the plaintiff's statement of claim and made a part thereof, violated the aforesaid Acts of Congress.

4. The Court erred in overruling the fourth ground of demurrer interposed by the defendant, The Pennsylvania Railroad Company, in its separate affidavit of defense in the nature of a demurrer to the plaintiff's statement of claim, thereby deciding that the averments of damage alleged to have been suffered by the plaintiff as set forth in the statement of claim were not vague, indefinite and speculative, and that the plaintiff was entitled to recover damages under such averments.

5. The Court erred in overruling the first ground of demurrer interposed by the defendant, Merchants Warehouse Company, in its separate statutory demurrer, thereby deciding that the averments of fact set forth in plaintiff's statement of its cause of action

constituted a cause of action under the provisions of the Act of Congress of July 2, 1890, c. 647, secs. 1 and 2, and of October 15, 1914, c. 323, sec. 4.

6. The Court erred in overruling the second ground of demurrer interposed by the defendant, Merchants Warehouse Company, in its separate statutory demurrer, thereby deciding that the provisions of the agreements referred to in paragraph 9 of the plaintiff's statement of claim, and made a part thereof, violated the aforesaid Acts of Congress.

7. The Court erred in overruling the third ground of demurrer interposed by the defendant, Merchants Warehouse Company, in its separate statutory demurrer, thereby deciding that the scope of the aforesaid agreements did not have for their object and purpose the loading and unloading of freight cars used in intrastate and interstate commerce by the defendant, Merchants Warehouse Company, for the defendant, The Pennsylvania Railroad Company, and therefore were subject to criticism under the provisions of the aforesaid Acts of Congress, in addition to the Act of Congress regulating interstate commerce.

8. The Court erred in entering the order of October 20, 1933 (under 28 U. S. C. A., sec. 636) allowing the plaintiff's motion for the production of certain documents, writings and records of the defendant, The Pennsylvania Railroad Company, mentioned in the said motion upon the trial of the above-entitled case.

9. The Court erred in permitting the plaintiff's witness, Ernest V. D. Sullivan, to testify over the objection and exception of counsel for the defendants as follows:

> "Q. Now, will you state the amount you received for handling the freight, which is covered by your statement?

"A. Our revenue for the handling of package freight in our warehouse during this period amounted to $365,517.47."

10. The Court erred in permitting the plaintiff's witness, Ernest V. D. Sullivan, to testify over the objection and exception of counsel for the defendants as follows:

"Q. You may answer.

"A. Our revenue for the handling service, computed at our regular tariff rates, would have been $901,795.82."

11. The Court erred in denying the motion of counsel for the defendants to strike out the testimony of the plaintiff's witness, Ernest V. D. Sullivan, with reference to certain schedules and exhibits which he submitted, and with respect to "the amount of revenue received by the Terminal Warehouse for certain services rendered by it" and "the revenue which they might have received upon the basis stated."

12. The Court erred in permitting the plaintiff's witness, Robert H. Rissinger, to testify over the objection and exception of counsel for the defendants with respect to certain reports and schedules prepared by the witness and offered in evidence as Plaintiff's Exhibits Nos. 19 and 20.

13. The Court erred in permitting the plaintiff's witness, Robert H. Rissinger, to testify over the objection and exception of counsel for the defendants as follows:

"Q. Will you state the amount?

"A. The amount of the claims paid by The Pennsylvania Railroad Company to the Merchants Warehouse Company for tonnage handled during the period from March 1, 1926, to March 31, 1931, was $634,886.16."

14. The Court erred in admitting in evidence as Plaintiff's Exhibits Nos. 19 and 20, over the objection and exception of counsel for the defendants, the report and supporting schedules prepared and submitted by the plaintiff's witness, Robert H. Rissinger, which report and schedules showed, inter alia, the amount of the allowances paid by the defendant, The Pennsylvania Railroad Company, to the defendant, Merchants Warehouse Company, during the period in suit, and also car detention for certain selected months.

15. The Court erred in denying the motion of counsel for the defendants to strike out the testimony of the plaintiff's witness, Robert H. Rissinger, with respect to his report and supporting schedules, and in particular his statement of the amount of the allowances paid to the defendant, Merchants Warehouse Company, by the defendant, The Pennsylvania Railroad Company.

16. The Court erred in charging the jury as follows:

> "They were applied to and asked to determine the merits of this contract to which I have alluded, and they decided that that contract was unfair, improper, illegal; and they issued what is called a 'desist order,' and that is that the carriers were to stop granting the privileges called for by that contract, and as soon as that was finally decided, the railroad companies cheerfully acquiesced in it, and since then the contract has not been in force, or acted upon."

17. The Court erred in charging the jury as follows:

> "I have been asked to say to you that there is no evidence of interstate commerce in this case. I decline to say that to you. There is evidence

in this case from which you may find that the business with which we are here concerned, the trade with which we are here concerned, the commerce with which we are here concerned, was in some measure, and, indeed, in large measure, interstate commerce. Therefore, the laws to which I will call your attention in a moment have application to it."

18. The Court erred in charging the jury as follows:

"The argument has been addressed to you that to the extent to which the Plaintiff was compelled to do that in this case, to that extent its damages are measurable and ascertainable, because it is a contrast between what may be called the fair price which you are justified in expecting you would have received had these unfair practices not been directed against you and what you did receive in the face of that competition.

"You may say that is vague, too; how much would he have received? It is vague. Nevertheless, it can be measured, and you are called upon to measure it every day.

"Suppose you and I make a contract and you agree to do something for me or to sell me something and we don't agree on the price. When you come to ask payment I say, 'No, I won't pay you any such price as that; that is too high; I will only pay you so much; that is the fair price.' We can't agree upon the fair price of the thing which you have sold me, or the fair value of the services which you have rendered. It is the commonest thing in the world for you to bring suit against me, and you would claim upon what lawyers call a 'quantum meruit.' How much are your services worth? You would submit it to a jury to determine what those services are generally worth, and that jury would be able with the guidance of the Court and the help of the evidence to determine what those services fairly are worth, or what the fair value of that product was, and for that amount

you could get a judgment against me. That is the thought of an appeal which I understand Plaintiff is making to you in this case."

19. The Court erred in charging the jury as follows:

"Here is a man who is in business. We will say an unlawful conspiracy is raised to take that business away from him and keep him from getting business which he would have otherwise hoped to have gotten. That is the mountain cloud idea; that seems perfectly clear and perfectly simple. But when you approach that with the idea that you are going to put a figure on that loss, you will see at once not only the difficulty of doing it, but the impossibility of doing it. You couldn't determine, after giving the subject all the thought of which you are capable, what proportion of the business he should have been doing, or catching, as the vernacular expression is; how much of that trade he would have received had it not been for this unlawful combination. You can't do it; therefore, the very capable counsel who represents the Plaintiff in this case has told you very plainly that he was not going to ask you to do something which he recognized and realized you could not do."

20. The Court erred in charging the jury as follows:

"The contracts between the Merchants Company and the Pennsylvania Railroad Company by which these advantages to which I have referred were given to the Merchants Company—or what, at least, every competitive warehouseman would consider would be an advantage to them—has figured very largely in this case, and very much has been said about the lawfulness of those contracts.

. . . . . .

"But there is this in the case: The defendant warehouse company received a substantial sum of money for services which, under the evidence, you

may find were not rendered to the railroad company but were rendered to itself. You can see that that would put a very formidable weapon into its hands in dealing with its competitors.

"If you and I are in competition, and somebody for some reason or other comes along and agrees that they will give me a substantial sum of money which you don't get and which you can't get, at once I have in my hands an instrument which, if I use it, I may use to take away your trade. How? Having this resort to an additional sum of money which you don't have, I can undercut you on prices, and you have only one of two things to do; let your business slip away from you and go to me, who is offering to do the same service at a less price, or you must cut your price in order to meet the price which I have set up and established.

. . . . . .

"Let me call your attention to something; if you and I are competitors in business, as I instanced before, and some one makes a contribution to me of a substantial sum of money which you do not get, that gives me, undoubtedly, a great advantage over you. Or, if I am relieved from the payment of some overhead or other charge to which you are necessarily subjected, so that in your business it must enter into the cost of your production but it doesn't enter into mine and I can thereby produce at a less cost than you can, that is clearly a great advantage to me, isn't it?

"Everybody would recognize that upon that statement, but it is no harm to you if that is all that is done. It is perfectly natural for us to be a little envious and jealous of our competitors, and you might question the fact that I have that advantage over you, but if I don't use that advantage to your disadvantage or your loss, it doesn't hurt you any."

21. The Court erred in failing to read to the jury the points submitted for charge by the defendants, and

to answer the same separately, or to cover such answers in its general charge.

22. The Court erred in declining to charge the jury in accordance with the defendants' first point for charge, as follows:

> "1. The defendant, Merchants Warehouse Company, was not engaged in trade or commerce among the several states."

23. The Court erred in declining to charge the jury in accordance with the defendants' third point for charge, as follows:

> "3. The interstate commerce or transportation by the defendant, The Pennsylvania Railroad Company, of freight from points outside of the State of Pennsylvania, consigned to or in care of the defendant, Merchants Warehouse Company, ceased upon the delivery thereof to the designated warehouse and such shipments thereupon lost their character of interstate shipments."

24. The Court erred in declining to charge the jury in accordance with the defendants' fourth point for charge, as follows:

> "4. The interstate commerce or transportation by the defendant, The Pennsylvania Railroad Company, of freight delivered to it at warehouses of the defendant, Merchants Warehouse Company, and consigned to points outside of the State of Pennsylvania, commenced on the delivery of the shipments to the Railroad Company and such freight did not acquire the character of interstate shipments until it was so delivered to the Railroad Company."

25. The Court erred in declining to charge the jury in accordance with the defendants' tenth point for charge, as follows:

"10. There is no evidence in this case that the defendants combined or conspired to restrain trade or commerce among the several states."

26. The Court erred in declining to charge the jury in accordance with the defendants' fourteenth point for charge, as follows:

"14. Intent is a necessary element in a conspiracy such as is here alleged, and in determining whether or not the defendants conspired to violate the Sherman Act, the jury may and should take into consideration the undisputed facts that the first of the series of contracts between the defendants antedate the Sherman Act, that the several contracts between the defendants were openly arrived at and were known to the State and Federal authorities, including the Director General of Railroads representing the United States, and that similar contracts have existed between the Reading Railroad and also the Baltimore & Ohio Railroad and the Pennsylvania Warehousing and Safe Deposit Company for upwards of thirty-five years, which contracts were likewise known to the aforesaid State and Federal authorities."

27. The Court erred in declining to charge the jury in accordance with the defendants' sixteenth point for charge, as follows:

"16. There is no evidence in this case that the defendants monopolized any part of the trade or commerce among the several states."

28. The Court erred in declining to charge the jury in accordance with the defendants' seventeenth point for charge, as follows:

"17. There is no evidence in this case that the defendants attempted to monopolize any part of the trade or commerce among the several states."

29. The Court erred in declining to charge the jury in accordance with the defendants' eighteenth point for charge, as follows:

> "18. There is no evidence in this case that the defendants combined or conspired to monopolize any part of the trade or commerce among the several states."

30. The Court erred in declining to charge the jury in accordance with the defendants' nineteenth point for charge, as follows:

> "19. Under the evidence in this case, the plaintiff's only right of action was under the Interstate Commerce Act of February 4, 1887, as amended, and no right of action exists with respect thereto under the Sherman Act of July 2, 1890, as amended."

31. The Court erred in declining to charge the jury in accordance with the defendants' twentieth point for charge, as follows:

> "20. By proceeding before the Interstate Commerce Commission to obtain reparation for losses alleged by it to have been suffered by reason of the operations under the contracts between the defendants in evidence in this case, plaintiff elected its remedy and under all the evidence has no right of action under the Sherman Act of July 2, 1890, as amended."

32. The Court erred in declining to charge the jury in accordance with the defendants' twenty-first point for charge, as follows:

> "21. Since it appears that in a proceeding before the Interstate Commerce Commission the plaintiff made a claim for damages based upon the same grounds upon which damages are now claimed in this action, and that the Commission refused to award reparation, and on petition for

reconsideration affirmed its refusal to award reparation in the nature of damages, the plaintiff cannot now recover such damages in this action."

33. The Court erred in declining to charge the jury in accordance with the defendants' twenty-second point for charge, as follows:

> "22. The amounts paid by The Pennsylvania Railroad Company to the Merchants Company are not evidence of the measure of plaintiff's damage, and if you find a verdict for the plaintiff you may not consider those payments in fixing the amount of your verdict."

34. The Court erred in declining to charge the jury in accordance with the defendants' twenty-third point for charge, as follows:

> "23. The difference between the total receipts of the plaintiff for handling shipments in its warehouse business and the amount which Mr. Sullivan testified should have been received, does not represent a measure of the plaintiff's damage, if any, and if you find a verdict for the plaintiff you may not base it on such difference."

35. The Court erred in declining to charge the jury in accordance with the defendants' twenty-fourth point for charge, as follows:

> "24. Since the total figure testified to by the plaintiff as representing the difference between the amount which it did receive and the amount which it should have received is based upon shipments received not only over the Pennsylvania Railroad but also over the Reading Railroad, by truck and by steamship, you may not base a finding of damage upon such total figure."

36. The Court erred in declining to charge the jury in accordance with the defendants' twenty-fifth point for charge, as follows:

"25. It appearing in this case and also in a prior proceeding between the same parties that like arrangements as these here complained of existed between other warehouses and other railways in the City of Philadelphia doing a business substantially equal to that of the plaintiff and defendant, it would be impossible for you to say in the absence of any affirmative evidence by the plaintiff, just how much, if any, damage was done to the plaintiff by these defendants and how much, if any, by other warehouses and other railroads who are not made parties defendant to this suit."

37. The Court erred in declining to charge the jury in accordance with the defendants' twenty-sixth point for charge, as follows:

"26. The detention of railroad cars prior to their arrival at the warehouses of the defendant, Merchants Warehouse Company, and the non-charging of demurrage on said cars by the defendant, The Pennsylvania Railroad Company, is not an item of damage in this case and may not be considered by the jury in fixing the amount of a verdict, if the jury should determine upon a verdict for the plaintiff."

38. The Court erred in declining to charge the jury in accordance with the defendants' twenty-ninth point for charge, as follows:

"29. The plaintiff has attempted to measure its damage by showing the amount received from its patrons for handling freight shipped by rail and truck and also the amount which it believes it should have received upon what it terms 'normal rate basis'. Its only definition of such normal rate basis is that that is the amount which it should have received in order to make a profit after deducting its costs of operation. There is no evidence that this so-called normal rate was ever received by anybody in the warehouse business in Philadelphia for doing this work and

there is specific evidence that it was not. Under these conditions you are not justified in finding such so-called normal rate as any standard of comparison upon which to base a claim for damages."

39. The Court erred in declining to charge the jury in accordance with the defendants' thirtieth point for charge, as follows:

"30. Without the establishment of a prevailing rate basis, the plaintiff's theory of measuring damages by comparing the amounts actually received with the amounts which would have been received upon a normal rate basis must fail."

40. The Court erred in declining to charge the jury in accordance with the defendants' thirty-first point for charge, as follows:

"31. Under the evidence in this case there can be no verdict rendered by you against the defendants for more than nominal damages."

41. The Court erred in declining to charge the jury in accordance with the defendants' thirty-second point for charge, as follows:

"32. The defendant, The Pennsylvania Railroad Company, was subject to rulings of the Interstate Commerce Commission and under the rulings of that Commission, which had been announced prior to and including the date of the latest contract between the defendants, there was no disapproval of the arrangement entered into by the defendants under their contracts."

42. The Court erred in declining to charge the jury in accordance with the defendants' thirty-fourth point for charge, as follows:

"34. Under all the evidence in the case your verdict must be for the defendants."

43. The Court erred in denying the defendants' motions for a new trial.

44. The Court erred in entering its order of June 22, 1934, making absolute the plaintiff's rule for judgment in treble the amount of the verdict by the jury.

45. The Court erred in entering its order of June 22, 1934, allowing to the plaintiff a counsel fee in the sum of $27,000, to be taxed as part of the costs.

46. The Court erred in permitting the entry of judgment for the plaintiff on June 25, 1934, in the sum of $410,338.81.

47. The Court erred in entering judgment for the plaintiff on June 25, 1934, in the sum of $410,338.81.

WHEREFORE, the defendants pray that the said judgment for $410,338.81 and the said Court order allowing a counsel fee in the sum of $27,000, to be taxed as part of the costs, may be reversed and set aside, and for such other and further relief as to the Court may seem just and proper.

JOHN HAMPTON BARNES,
Attorney for The Pennsylvania Railroad Company.
ROBERT T. MCCRACKEN,
Attorney for Merchants Warehouse Company, Defendants.

ACKNOWLEDGMENT OF SERVICE.

As counsel for the Terminal Warehouse Company, the above-named plaintiff, I hereby acknowledge service of a copy of the above assignment of errors.

WHITE, SCHNADER, MARIS & CLAPP,
Attorneys for Terminal Warehouse Company, Plaintiff.

Dated: August 15, 1934.

PRÆCIPE FOR RECORD ON APPEAL.

(Filed August 15, 1934.)

To the Clerk of the said Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Third Circuit pursuant to an appeal allowed in the above-entitled cause of action; and to include in such transcript the following:

Docket entries.

Plaintiff's statement of claim.

Stipulation of counsel of April 25, 1932, for filing of exhibits and the attached exhibits.

Statutory demurrer of Merchants Warehouse Company.

Affidavit of defense in the nature of a demurrer of The Pennsylvania Railroad Company to plaintiff's statement of claim.

Opinion by Dickinson, J., of November 2, 1932, ruling questions of law in favor of the plaintiff with leave to the defendants to file an affidavit of defense to the fact averments of the statement of claim.

Court order of November 10, 1932, overruling the statutory demurrers and granting leave to file an affidavit of defense within fifteen days.

Exception by The Pennsylvania Railroad Company to order of Court overruling the statutory demurrer and order of Court granting an exception nunc pro tunc.

Exception by Merchants Warehouse Company to order of Court overruling the statutory demurrer and order of Court granting an exception nunc pro tunc.

Affidavit of defense of The Pennsylvania Railroad Company.

Affidavit of defense of Merchants Warehouse Company.

Stipulation of counsel amending paragraph 14 of the affidavit of defense of The Pennsylvania Railroad Company.

Plaintiff's motion to require the production of writings at trial and supporting affidavit.

Answer of The Pennsylvania Railroad Company to motion to require the production of writings on the trial.

Supplemental answer of The Pennsylvania Railroad Company to motion to require the production of writings on the trial.

Opinion of Dickinson, J., of October 20, 1933, granting motion for the production of writings (under 28 U. S. C. A. sec. 636) and Court order thereon.

Exception of The Pennsylvania Railroad Company to order for the production of writings, etc., and the order of Court granting the exception.

Order of Court of March 29, 1934, extending the time for the filing of motions for a new trial by the defendants.

Motion and reasons by Merchants Warehouse Company for a new trial.

Motion and reasons by The Pennsylvania Railroad Company for a new trial.

Opinion by Dickinson, J., of May 8, 1934, directing that the defendants' motions for a new trial and in arrest of judgment be set down for reargument.

Opinion by Dickinson, J., of June 1, 1934, discharging rule for a new trial, denying motion in arrest of judgment, and granting leave to the plaintiff to move for judgment on the verdict in accordance with the Sherman Anti-Trust Act, with costs and counsel fee.

Exception of The Pennsylvania Railroad Company to the refusal of the Court to grant its motion for a new trial and the order of Court granting the exception.

Exception of Merchants Warehouse Company to the refusal of the Court to grant its motion for a new trial and the order of Court granting the exception.

Plaintiff's motion for judgment and to treble damages.

Defendants' answer to plaintiff's motion for judgment and to treble damages.

Defendants' supplemental answer to plaintiff's motion for judgment and to treble damages.

Supplemental answer of The Pennsylvania Railroad Company to plaintiff's motion for judgment and to treble damages.

Plaintiff's petition for the allowance of a counsel fee.

Defendants' answer to petition for the allowance of a counsel fee.

Opinion by Dickinson, J., of June 22, 1934, making absolute the plaintiff's rule for judgment for treble damages and for the allowance of a counsel fee, and granting leave to enter judgment for the plaintiff in the sum of $410,338.81, and fixing counsel fee at $27,000, to be taxed as part of the costs.

Plaintiff's præcipe to enter judgment.

Judgment of June 25, 1934, in favor of plaintiff in the sum of $410,338.81 together with costs including a counsel fee of $27,000.

Exception of The Pennsylvania Railroad Company to Court order trebling the amount of the verdict and allowing a counsel fee, and order of Court granting an exception thereto.

Exception of Merchants Warehouse Company to Court order trebling the amount of the verdict and allowing a counsel fee, and order of Court granting an exception thereto.

Order of Court of April 3, 1934, extending the time for the presenting and sealing of the bill of exceptions.

Order of Court of June 6, 1934, further extending the term and time for the presenting and sealing of the bill of exceptions.

Supplemental order of Court of July 5, 1934, further extending the time for the presenting and sealing of the bill of exceptions, and further extending the term thereof.

Bill of exceptions and order of Court sealing the same (including the testimony in narrative form, the charge, the points for charge, and the verdict).

Defendants' petition for allowance of appeal and Court order allowing appeal with supersedeas.

Defendants' assignment of errors.

Præcipe for record on appeal and acknowledgment of service thereof.

Clerk's certificate.

JOHN HAMPTON BARNES,
ROBERT T. MCCRACKEN,
Attorneys for Defendants-Appellants.

ACKNOWLEDGMENT OF SERVICE.

As counsel for the Terminal Warehouse Company, the above-named plaintiff, I hereby acknowledge service of a copy of the above præcipe for record on appeal.

WHITE, SCHNADER, MARIS & CLAPP,
Attorneys for Plaintiff-Appellee.

Dated: August 15, 1934.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *ss.:*

I, GEORGE BRODBECK, Clerk of the United States District Court in and for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and full copy of so much of the pleas and proceedings; in the case of Terminal Warehouse Company, a corporation, v. Pennsylvania Railroad Company, a corporation, and Merchants Warehouse Company, a corporation, No. 16774, March Term, 1932; as per præcipe filed, a copy of which is hereto annexed, a transcript of record in the above-entitled case is to include, and now remaining among the records of the said court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of
(Seal) the aforesaid Court at Philadelphia this tenth day of September, A. D. 1934.

GEORGE BRODBECK,
Clerk.

REFERENCE TO ARGUMENT.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5586. October Term, 1934.

Pennsylvania Railroad Company and Merchants Warehouse Company,
Defendants-Appellants,

v.

Terminal Warehouse Company,
Plaintiff-Appellee.

And afterwards, to wit, the tenth day of January, 1935, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis and Honorable J. Whitaker Thompson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the tenth day of July, 1935, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5586. October Term, 1934.

PENNSYLVANIA RAILROAD COMPANY
AND
MERCHANTS WAREHOUSE COMPANY,
Defendants-Appellants,
v.
TERMINAL WAREHOUSE COMPANY,
Plaintiff-Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

OPINION.

(Filed July 10, 1935.)

Before BUFFINGTON, DAVIS and THOMPSON, *Circuit Judges.*

THOMPSON, *Circuit Judge.*

This is an appeal from a judgment of the District Court for the Eastern District of Pennsylvania. The plaintiff is the Terminal Warehouse Company, hereinafter referred to as Terminal, and the defendants are the Pennsylvania Railroad Company, a common carrier, and Merchants Warehouse Company, hereinafter referred to as Pennsylvania Railroad and Mer-

chants, respectively. Terminal brought action at law in the District Court for the Eastern District of Pennsylvania under the Sherman Act (15 U. S. C. A. 1, 2) and the Clayton Act (15 U. S. C. A. 15).

The pertinent sections of the Sherman Act provide:

> "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."
>
> "Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The pertinent section of the Clayton Act provides:

> "Section 15. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Terminal alleged that it had been damaged by reason of an unlawful combination and conspiracy be-

tween Pennsylvania Railroad and Merchants, whereby Terminal was prevented from obtaining its fair, just and normal share of the warehousing business in Philadelphia and whereby its profits from the business which it did obtain were diminished. It claimed treble damages and costs, including a reasonable attorney's fee. The questions of law raised in the affidavit of defense were resolved against the defendants and the case was thereupon tried upon the merits to a judge and jury. The jury returned a verdict in favor of Terminal in the amount of $136,125. On motion, the District Court trebled the amount, directing the entry of judgment in favor of Terminal in the amount of $410,338.81, and allowed a counsel fee of $27,000 to be taxed as part of the costs.

The statement of claim contained allegations that Terminal and Merchants were each engaged in the general warehousing business; that they received, handled, stored, and forwarded goods in interstate commerce; that they were competitors for the Philadelphia warehousing business; that they solicited business outside of Pennsylvania; that Pennsylvania Railroad owned a considerable block of stock of Merchants from which it received substantial dividends; that Pennsylvania Railroad and Merchants combined and conspired to destroy Terminal's business so as to acquire a monopoly of Philadelphia's warehousing business for Merchants and the complementary transportation business for Pennsylvania Railroad; that, in accordance with a series of written contracts extending over thirty years, Pennsylvania Railroad made payments to Merchants, and Merchants gave preferences to Pennsylvania Railroad until the payments were declared unlawful. Terminal's original claim for damages was based on loss of anticipated profits on business of which it alleged it was unlawfully deprived, and loss because of diminished profits on busi-

ness actually transacted by it. Its final claim, however, was restricted to loss because of diminished profits.

The defendants maintain that the action is barred by a prior proceeding involving the same parties before the Interstate Commerce Commission. In 1928 Terminal and two others engaged in the warehousing business in Philadelphia filed a complaint with the Interstate Commerce Commission in which it was alleged that Pennsylvania Railroad was violating the Interstate Commerce Act by paying Merchants rebates on freight charges. Merchants voluntarily became a party to that proceeding, thus enabling the complainants, including Terminal, to press their claim against the favored shipper as well as against the carrier. The complainants prayed for a cease and desist order which the Commission allowed. This order was sustained by a statutory three-judge court in Merchants Warehouse Company v. United States, 44 F. (2d) 379, and affirmed by the Supreme Court in 283 U. S. 501. The complaint also contained a prayer that Pennsylvania Railroad be required to pay an award of damages to each of the complainants by way of reparation. The Commission denied reparation. It said:

> "Complainants confine the basis of their claim for reparation to damages resulting from shrinkage or diminution of their normal business profits. They urge that they be permitted to submit proof of actual pecuniary loss at a further hearing to be held subsequent to the decision herein, contending that it would be impracticable to make such proof prior to the date the unjust discrimination and undue prejudice is removed. We are not inclined to this view. Complainants have been accorded ample opportunity to present facts supporting an award of reparation. Their case must stand or fall on the facts now of record. The evidence is far too vague and indefinite to warrant

> the conclusion that complainants have suffered actual pecuniary loss attributable directly to the alleged unlawful practices. Damage must be shown with certainty to support an award of reparation under findings of unjust discrimination or undue prejudice. Penna. R. R. Co. v. International Coal Co., 230 U. S. 184, 206. Reparation is denied."

Terminal took no appeal from the order denying reparation.

In the action before the Commission, the complainants produced documentary evidence that the subsidized warehouse companies cut or shrunk normal warehouse charges by affording free distribution of warehouse freight. They also produced testimony that the rebates, which took the form of allowances, enabled the subsidized warehouse companies to give free service; that the rebates were used to the detriment of the complainants; and that the combination fixed the market value of the warehouse service in Philadelphia. In the action before the District Court, Terminal produced testimony that Merchants made no charge for goods handled during the forty-eight hour free period and collected no demurrage for car detention, whereas Terminal had to pay for car detention as well as for construction and maintenance of side tracks to its warehouses; that Terminal had to charge its costs for handling in-bound and out-bound freight, and could not compete with Merchants' offer of free service because it received no railroad allowance; that, as a result, Terminal could not handle heavy density products and had to reduce its rates on light density products; and that reduced charges, made necessary by the alleged unfair competition, were less by $536,278.35 than the normal rate would have netted Terminal.

We conclude that the testimony upon which Terminal relied to prove damages in the District Court was substantially identical with that upon which it relied to prove damages before the Commission.

If the Commission had jurisdiction to award damages and if the claim before the Commission amounted to an election of remedies, the questions of law raised in the affidavit of defense should have been resolved in favor of Pennsylvania Railroad and Merchants.

The Interstate Commerce Commission had jurisdiction to award damages as reparation for actual loss sustained by reason of an unlawful preference. On this point we need but quote from the opinion in Interstate Commerce Commission v. United States, 289 U. S. 385, 388, where the Supreme Court said:

> "The Interstate Commerce Act makes it unlawful for a carrier to give any undue or unreasonable preference to a person or locality, or to subject any person or locality to an undue disadvantage (24 Stat. 380, sec. 3; 41 Stat. 479, sec. 405; 49 U. S. C., sec. 3), and charges the offender with liability for the full amount of damages resulting from the unlawful act. Sec. 8. Upon the hearing of a complaint, the Commission is empowered to ascertain the damages and award them. Sec. 16(1)."

The phrase "full amount of damages", referred to in the above opinion is sufficiently broad in scope to include damages for injury to one's business, including shrinkage of normal business profits. Interstate Commerce Commission v. United States, supra; Keogh v. C. & N. W. Ry. Co., 260 U. S. 156; Pennsylvania R. R. Co. v. Weber, 257 U. S. 85; Pennsylvania R. R. Co. v. Minds, 250 U. S. 368; L. & N. R. R. Co. v. Ohio Valley Tie Co., 242 U. S. 288; Pennsylvania R. R. Co. v. Jacoby & Co., 242 U. S. 89; Pennsylvania R. R. Co. v. International Coal Co., 230 U. S. 184.

Several statutory remedies were available to Terminal. It could have petitioned the Interstate Commerce Commission for an order directing the offending common carrier to cease and desist from the unlawful practices and for an award of damages; or it could have sued in the appropriate District Court for an award of damages or treble damages. It did not have the right, however, to pursue each of the above remedies successively until such time as it found a tribunal which would award the damages sought. As we have already stated, Terminal did in fact petition the Interstate Commerce Commission for a cease and desist order, which was granted, and for an award of damages, which was denied. Terminal thereby elected its remedy, and is barred from subsequent action for the same damages. We deem the following language of the Supreme Court in Interstate Commerce Commission v. United States, 289 U. S. 385, 388, to be pertinent to the facts in the instant case, and determinative of the issue of election of remedies:

> "The respondent by its complaint to the Commission invoked this dual jurisdiction, the administrative jurisdiction to prescribe a rule for the future (Great Northern Railway Co. v. Merchants Elevator Co., 259 U. S. 285, 291; Baltimore & Ohio R. Co. v. Brady, 288 U. S. 448), and the judicial or quasi-judicial jurisdiction to give reparation for the past. Baltimore & Ohio R. Co. v. Brady, supra. In dismissing such a complaint, the Commission speaks with finality. Its orders purely negative—negative in form and substance—are not subject to review by this court or any other. Standard Oil Co. v. United States, 283 U. S. 235; Alton R. Co. v. United States, 287 U. S. 229; Procter & Gamble Co. v. United States, 225 U. S. 282; Baltimore & O. R. Co. v. Brady, supra. Damages for discrimination denied by the Commission are not recoverable somewhere else."

Upon the same point see Baltimore & Ohio R. Co. v. Brady, 288 U. S. 448; Standard Oil Co. v. United States, 283 U. S. 235; Penna. R. R. Co. v. Clark Coal Co., 238 U. S. 456; Hillsdale Coal & Coke Co. v. Pennsylvania R. Co., 237 Fed. 272.

We conclude that the present action is barred by the prior proceedings before the Interstate Commerce Commission.

Judgment reversed.

A true Copy:
Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

ORDER REVERSING JUDGMENT.

(Filed July 10, 1935.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5586. October Term, 1934.

Pennsylvania Railroad Company and Merchants Warehouse Company,
Defendants-Appellants,

v.

Terminal Warehouse Company,
Plaintiff-Appellee.

On appeal from the District Court of the United States, for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed, with costs.

Philadelphia, July 10, 1935.

J. W. THOMPSON,
Circuit Judge.

(Endorsements): 5586. Order reversing judgment. Received and filed July 10, 1935. William P. Rowland, Clerk.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *Sct.:*
THIRD JUDICIAL CIRCUIT,

I, WILLIAM P. ROWLAND, clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this court in the case of Pennsylvania Railroad Company, et al., appellants, v. Terminal Warehouse Co., appellee, No. 5586, on file, and now remaining among the records of the said court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this first
(Seal) day of August in the year of our Lord one thousand nine hundred and thirty-five and of the Independence of the United States the one hundred and sixtieth.

WILLIAM P. ROWLAND,
Clerk of the United States Circuit Court of Appeals, Third Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(7174-C)

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IN THE

Supreme Court of the United States

No. 351 October Term, 1935.

TERMINAL WAREHOUSE COMPANY (Plaintiff-Appellee in the Court Below),

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY and MERCHANTS WAREHOUSE COMPANY, (Defendants-Appellants in the Court Below),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUBJECT INDEX.

	Page
PETITION FOR WRIT OF CERTIORARI	1
Summary Statement of the Matter Involved	2
Questions Presented	6
Reasons for Granting the Writ	6
Prayer	7
Affidavit	8
BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI	9
Opinions of the Court Below	9
Jurisdiction	10
Statement of the Case	10
Specification of Errors	10
Argument	11
The Denial of Reparation by the Interstate Commerce Commission Was Not a Bar to the Subsequent Suit Under the Sherman Act	11
APPENDIX (RELEVANT STATUTORY PROVISIONS)	21
Section 1 of the Sherman Act	21
Section 2 of the Sherman Act	21
Section 4 of the Clayton Act	21
Section 8 of the Interstate Commerce Act	22
Section 9 of the Interstate Commerce Act	22
Section 10 (4) of the Interstate Commerce Act	23

TABLE OF CASES CITED.

	Page
Bailey v. Pennsylvania Railroad Company et al., 4 Fed. Supp. 786	9
Bistline v. United States, 229 Fed. 546	20
E. C. Miles Lumber Co. v. C., B. & Q. R. R. et al., 89 I. C. C. 761	16
Henderson Tire & Rubber Co. v. Gregory et al., 16 F. (2d) 589	19
Interstate Commerce Commission v. United States ex rel. Campbell, 289 U. S. 385	5
Joynes v. P. R. R. Co., 17 I. C. C. 361	16
Louisville & Nashville R. R. Co. v. Ohio Valley Tie Co., 242 U. S. 288	17
Merchants Warehouse Company v. United States et al., 283 U. S. 501	2, 4
Midland Savings & Loan Co. v. Tradesmen's Nat. Bank, 57 F. (2d) 686, certiorari denied 287 U. S. 615	19
Procter & Gamble Co. v. United States et al., 225 U. S. 282	5
Southern Pacific Co. v. Bogert et al., 250 U. S. 483	20
Southwestern Milling Co. v. C., R. I. & P. Ry. Co. et al., 161 I. C. C. 291	16
Standard Oil Co. v. United States et al., 283 U. S. 235	5
Terminal Warehouse Company v. Pennsylvania Railroad Company et al., 7 Fed. Supp. 484	9
Wheeling & L. E. R. Co. et al. v. Carpenter et al., 264 Fed. 772	20
William W. Bierce, Ltd. v. Hutchins, 205 U. S. 340	20

TABLE OF STATUTES CITED.

	Page
Judicial Code, section 240, as amended	10
Act of February 4, 1887, c. 104, 24 Stat. at L. 382 (Interstate Commerce Act) as amended—	4, 6, 12, 13, 15-17, 22-23
Act of July 2, 1890, c. 647, 26 Stat. at L. 209 (Sherman Anti-Trust Act)	2, 5, 6, 7, 11, 14-17, 21
Act of October 15, 1914, c. 323, 38 Stat. at L. 731 (Clayton Act)	21-22

IN THE

Supreme Court of the United States

No. . October Term, 1935.

TERMINAL WAREHOUSE COMPANY (PLAINTIFF APPELLEE IN THE COURT BELOW),
Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY AND MERCHANTS WAREHOUSE COMPANY (DEFENDANTS APPELLANTS IN THE COURT BELOW),
Respondents.

Petition for Writ of Certiorari.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered July 10, 1935 (R. 666), reversing the judgment of the District Court of the United States for the Eastern District of Pennsylvania in favor of petitioner and against respondents in the amount of $410,338.81, together with costs, including a counsel fee of $27,000 (R. 629). A certified transcript of the record in the case, including the proceedings in the United States Court of Appeals for the Third Circuit, is furnished herewith in compliance with the rules of this Court.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is an action at law by petitioner to recover damages for injuries suffered in consequence of defendants' violation of Sections 1 and 2 of the Sherman Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. at L. 209.[1] Petitioner is engaged in the public warehousing business. It maintains several large warehouses served by railroad sidings. Its business consists in receiving, storing, handling, shipping and reshipping package freight. Respondent Warehouse Company is engaged in the same business as petitioner, and respondent Railroad Company is a common carrier (R. 175-183). Under a series of contracts between the two respondents (R. 18-93) the Merchants Company agreed to solicit and ship package freight exclusively over the lines of the Railroad Company, and the Railroad Company in turn agreed to pay the Merchants Company certain allowances, ostensibly for services in loading, unloading and handling freight at its own warehouses, but in reality as compensation for the solicitation of freight movements over the lines of the carrier. Railroad Company also agreed by these contracts to furnish certain siding connections without expense to the Merchants Company. The payment of such allowances was held to be illegal by this Court in *Merchants Warehouse Company v. United States, et al.*, 283 U. S. 501.

In the case at bar it was further shown that the Railroad Company allowed inbound loaded cars consigned to warehouses of the Merchants Company to remain on its tracks for long periods of time without charging any demurrage such as all other shippers were required to pay (R. 169, 279, 369). This exemption from demurrage charges

[1] The statutory provision is printed in full in the appendix, page 21.

was based on the claim that the warehouses of the Merchants Company should be considered to be freight stations of the Railroad Company. This Court in the case above cited held that the warehouses were not freight stations.

It was shown that the Railroad Company owned stock in the Merchants Company (R. 140). It, of course, profited by the freight charges which it collected on the increased volume of freight moving over its lines to and from the Merchants' warehouses, and the Merchants Company in turn profited by the freedom from demurrage charges, by the free use of sidetracks furnished by the Railroad Company (R. 19, 40, 59, 69, 76, 82, 88) and by the payment of the allowances aforesaid, which it was shown during the period in suit amounted to $634,886.16 (R. 248).

Petitioner proved that by reason of these favors and advantages granted to the Merchants Company it was enabled to and did give loading, unloading and handling services to its customers free of charge (R. 187, 189, 239, 241, 243, 276-277, 333, 335, 338, 352, 354, 357, 360, 363), that it could and did free them from demurrage charges (R. 163, 239, 240, 243, 311-313, 357-358, 364), and that petitioner in order to meet this competition was obliged to absorb demurrage charges and also to give free loading, unloading and handling services, although it received no allowances or other compensation therefor, and to lower its rates otherwise below a fair charge (R. 189-190, 196).

Petitioner offered specific evidence of its loss so occasioned; the jury found, under proper instructions, that respondents had violated the Sherman Act, and returned a verdict in favor of petitioner in the amount of $136,125 (R. 4). This was trebled by the Court pursuant to the statute and a counsel fee was, after hearing, allowed (R. 6). Judgment was thereupon entered as above noted.

Motions for new trial were overruled in due course, and an appeal was taken to the Court of Appeals for the Third Circuit, which reversed the judgment on the sole ground that petitioner's right of action was barred by a prior proceeding before the Interstate Commerce Commission which was reviewed by this Court in *Merchants Warehouse Company v. United States et al.*, 283 U. S. 501, supra (R. 665).

In the proceeding referred to, petitioner and three others doing a warehousing business in Philadelphia, filed a complaint with the Interstate Commerce Commission alleging that respondent Railroad Company was violating the Interstate Commerce Act by paying rebates on freight rates to respondent Warehouse Company through the guise of allowances for handling freight (R. 451). Similar complaints against two other carriers were consolidated with this one. The Commission found the practice illegal and issued a "cease and desist" order (R. 476) which was sustained by this Court in the case above cited.

Complainants, including petitioner, also asked the Commission in said proceeding for reparation. The Commission denied reparation on the correct ground that there was nothing in the record "to warrant the conclusion that complainants have suffered actual pecuniary loss attributable directly to the alleged unlawful practices" (R. 484).

Petitioner accepted this decision as a ruling (sustaining the contention of the Railroad Company) that said damages could not be the subject of a reparation order under sections 8 and 9 of the Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. at L. 382,[1] for the reason that they were not the direct result of violations of that Act by respondent Railroad Company, and we concede that they were not.

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[1] The statutory provision is printed in full in the appendix, pages 22-23.

Petitioner, of course, could not appeal from the decision: *Interstate Commerce Commission v. United States ex rel. Campbell*, 289 U. S. 385, 388; *Standard Oil Co. v. United States et al.*, 283 U. S. 235, 238; *Procter & Gamble Co. v. United States et al.*, 225 U. S. 282; although the learned Court below refers to its failure to appeal as if that fact was significant (R. 662).

Petitioner thereupon filed this action to recover its loss, alleging that it was the result of a conspiracy by respondents to violate the Sherman Anti-Trust Law. The learned Court of Appeals for the Third Circuit in reversing the judgment in favor of petitioner in the District Court holds that the Interstate Commerce Commission did have jurisdiction to award the damages claimed, although they clearly were not caused by the payment of the allowances held to be illegal rebates, but by the intervening and independent act of a non-carrier in establishing unfair competitive rates and practices pursuant to a conspiracy in which both respondents participated: the conspiracy involved not only the payment of allowances, but also other favors granted the Warehouse Company which were not alleged or proven before the Interstate Commerce Commission. The Court below however, holding that the Interstate Commerce Commission had statutory authority to award such damages not only against the carrier but also against the non-carrier, concluded that petitioner's action was barred, and reversed the judgment.

QUESTIONS PRESENTED.

The decision of the Circuit Court of Appeals presents the following questions:

1. Do sections 8 and 9 of the Interstate Commerce Act authorize the Commission to award reparation against a non-carrier?

2. Will a claim for reparation against a common carrier constitute an election of remedy or bar to future action against a non-carrier because it voluntarily intervened in a proceeding before the Commission in which no award could have been made against it?

3. Is a claim for damages resulting from a conspiracy between a carrier and a non-carrier to violate the Sherman Anti-Trust Act, barred because in a previous proceeding before the Interstate Commerce Commission against the carrier, reparation had been requested for payment of unlawful rebates, one of several overt acts relied upon to prove the conspiracy, which claim had been denied on the ground that it had not been proven that the damage was "directly attributable" to the payment of rebates?

REASONS FOR GRANTING THE WRIT.

The discretionary power of this Court to grant the writ prayed for is respectfully invoked upon the following grounds:

1. In holding that the Interstate Commerce Commission under sections 8 and 9 of the Interstate Commerce Act may make an award of reparation against a non-carrier, the Court of Appeals for the Third Circuit has decided an important question of Federal law in a way probably in conflict with the weight of authority and which has not been, but should be, settled by this Court.

2. In holding that an action to recover damages caused by acts of a non-carrier, pursuant to a conspiracy with a carrier to violate the Sherman Anti-Trust law, is barred because a claim for reparation had previously been filed by plaintiff against the carrier, which was denied because the evidence did not establish that the loss sustained was directly attributable to the payment of unlawful rebates (one of the elements of the conspiracy), the Circuit Court of Appeals for the Third Circuit has decided an important question of Federal law in a way probably untenable, and which has not been, but should be, settled by this Court.

PRAYER.

Wherefore your petitioner prays that this Court issue a writ of certiorari, directed to the United States Circuit Court of Appeals for the Third Circuit, requiring that Court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full complete transcript of the record on its docket which is entitled No. 5586, October term, 1934, Pennsylvania Railroad Company and Merchants Warehouse Company v. Terminal Warehouse Company; that, upon such review and determination, the opinion and judgment of said Court of Appeals may be reversed by this honorable Court and the said judgment of the United States District Court may be affirmed.

TERMINAL WAREHOUSE COMPANY.

By JOHN J. HICKEY,
T. R. WHITE,
WILLIAM A. SCHNADER,
WHITE, MARIS & CLAPP,
Attorneys for Petitioner.

AFFIDAVIT.

I hereby certify that I am a member of the bar of the Supreme Court of the United States; that I am Counsel for the Terminal Warehouse Company, the petitioner herein; that the foregoing petition has been prepared in accordance with the request of the petitioner; that the allegations in said petition are true to the best of my knowledge and belief; that said petition is not made for the purpose of delay or prolongation of litigation and is, in my opinion, well founded in law and in fact and should be granted.

.....

.....

Brief in Support of Petition for Writ of Certiorari.

OPINIONS OF THE COURT BELOW.

The opinions of the District Court for the Eastern District of Pennsylvania relating to various phases of this case as it developed were all written by Judge Oliver B. Dickinson. That dismissing the statutory demurrers (filed November 2, 1932) will be found on pages 96-102 of the record and is reported sub nomine Bailey v. Pennsylvania Railroad Company et al., 4 Fed. Supp. 786. That granting the motion under 28 USC § 636 for the production of writings (filed October 20, 1933) will be found on pages 129-132 of the record. It is not reported. That dismissing the motion for new trial (filed May 8, 1934) and the supplemental opinion on re-argument (filed June 1, 1934) are to be found in the record at pages 598-611, and are reported as Terminal Warehouse Company v. Pennsylvania Railroad Company et al., 7 Fed. Supp. 484. That on the rule for judgment for treble damages and for allowance of counsel fees (filed June 22, 1934) is to be found in the record at pages 625-628. It is not reported.

The opinion of the Circuit Court of Appeals for the Third Circuit (Circuit Judges Buffington, Davis and Thompson), written by Judge Thompson, was filed July 10, 1935. It is to be found in the record, at pages 658-665. It is not yet reported.

JURISDICTION.

The jurisdiction of this court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. at L. 938, 28 USC §347.

The judgment of the Circuit Court of Appeals for the Third Circuit which petitioners seek to have reviewed was entered July 10, 1935 (R. 666).

STATEMENT OF THE CASE.

The essential facts of this case have already been stated in the accompanying petition and need not be repeated here.

SPECIFICATION OF ERRORS.

The errors which petitioner will urge if the writ of certiorari be granted is that the Circuit Court of Appeals for the Third Circuit erred:

1. In its finding as follows: "We conclude that the present action is barred by the prior proceedings before the Interstate Commerce Commission."

2. In its order reading as follows: "Judgment Reversed."

ARGUMENT.

The Denial of Reparation by the Interstate Commerce Commission Was Not a Bar to the Subsequent Suit Under the Sherman Act.

The proceeding alleged by the learned Circuit Court of Appeals to bar petitioner in this action was begun in 1928 by the filing of a formal complaint with the Interstate Commerce Commission assailing the payment of warehouse allowances by the Pennsylvania Railroad Company as illegal and praying for reparation (R. 451). Respondent Railroad Company was the only defendant in that proceeding; although respondent Warehouse Company voluntarily intervened for the protection of its interests (R. 473-475).

Petitioner, in connection with the presentation of its case offered evidence of shrinkage or diminution of its normal business profits due to the unfair competition it encountered (R. 484, 494-498). The Commission ruled that the allowances constituted unlawful rebates, but, upon application by petitioner for a further hearing at which it proposed to offer evidence of the amount of loss sustained by it, held that such further hearing should be refused, stating that the proof which had been submitted was "too vague and indefinite to warrant the conclusion that complainants suffered actual pecuniary loss attributable directly to the alleged unlawful practices." (R. 484.) Reparation was, therefore denied.

It is this ruling by Division 3 of the Interstate Commerce Commission (R. 476-485) which the court below holds bars the petitioner from prosecuting the case at bar, which was an action at law for violation of the Sherman Act, brought against the carrier involved in the proceedings

before the Interstate Commerce Commission and also against a non-carrier who was not named as a defendant in that case, although it voluntarily intervened.

There are several points in which we respectfully urge that the learned Court of Appeals for the Third Circuit erred in reaching its conclusion.

Its decision was based on the assumption that petitioner in the proceeding before the Interstate Commerce Commission could have recovered the damages alleged, had its evidence been sufficient, not only against respondent Railroad Company but also against respondent Warehouse Company. The Court's language on the latter point was:

> "Merchants voluntarily became a party to that proceeding, thus enabling the complainants, including Terminal, to press their claim against the favored shipper as well as against the carrier." (R. 661.)

The Court of Appeals therefore concluded that inasmuch as petitioner could have recovered against both respondents had its evidence been sufficient, it could not thereafter recover the loss sustained in an action under the Sherman Act in another tribunal.

It is respectfully pointed out that the Court of Appeals was clearly in error in holding that a reparation claim could have been successfully urged against Merchants Warehouse Company, a non-carrier. Sections 8 and 9 of the Interstate Commerce Act [1] expressly provide that the remedy afforded to the party injured under that act shall be against the common carrier guilty of violation of said act.

Section 8 provides that "in case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful . . .

[1] The statutory provision is printed in full in the appendix, pages 22-23.

such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provision of this chapter'' etc.[1]

This is the clause quoted by the learned Court of Appeals for the Third Circuit as permitting full damages to be recovered, whatever they may be, and it is clear that it refers only to the recovery of damages against a common carrier.

Section 9 is equally clear, giving a right of action to any ''persons claiming to be damaged by any common carrier subject to the provisions of this chapter'' with the proviso that such person may either make complaint before the Commission or bring suit in Court, but cannot do both.[2]

With great respect for the opinion of the learned Court below, we contend that its holding was error. There is no provision in the act whereby the Commission may award reparation against anyone other than a carrier. Congress has expressly provided for cases in which there is joint liability on the part of a carrier and non-carrier for violation of the act by permitting joint suits under Section 10 (4)[3], but all such actions must be brought in court where a jury trial may be had. The liability of the non-carrier can not be the basis of an award under Sections 8 and 9, nor in any case by the Commission.

It is, therefore, we submit, very clear that the learned Court below erred in holding that petitioner might have pressed its claim against respondent Merchants Warehouse Company in the proceeding before the Interstate Commerce Commission, and consequently the conclusion of the Court that petitioner is barred must necessarily fall.

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[1] The statutory provision is printed in full in the appendix, page 22.
[2] The statutory provision is printed in full in the appendix, pages 22-23
[3] The statutory provision is printed in full in the appendix, page 23.

Even if this Court should be of opinion that petitioner's claim against respondent Railroad Company was barred by what was done before the Interstate Commerce Commission, we can think of no conceivable principle upon which such claim could be barred against the Merchants Warehouse Company against which no award could have been made.

It is also worthy of note that petitioner never asked for any order of reparation against respondent Warehouse Company. Petitioner's complaint was directed solely against respondent Railroad Company and the prayer for reparation was against that Company only (R. 455). Petitioner could never receive any reparation for which it had not asked and should not be barred from recovering damages on account of a denial of reparation which it never requested. The report of the Commission makes no reference to the respondent Warehouse Company except to note that it had intervened (R. 477-478).

We therefore submit that there is no basis for the ruling that petitioner is barred from proceeding under the Sherman Act on the theory that it pressed a claim for reparation against both respondents, which the Commission could have granted had it found the evidence sufficient.

There is a further and equally conclusive reason why denial of reparation by the Interstate Commerce Commission should not bar this suit. The denial of a further hearing at which petitioner could offer proof of the amount of damage suffered by it was based upon the conclusion of the Commission, as expressed by it and quoted by the Court below that,

> "the evidence is far too vague and indefinite to warrant the conclusion that complainants have suffered actual pecuniary loss attributable directly to the alleged unlawful practices". (R. 484.)

In other words, the Commission held that petitioner had not proven the *fact* of damage, which could be the basis of a reparation order, a necessary preliminary to a further hearing at which the *amount* of damage should be ascertained. This in turn was based upon its conclusion that the injuries sustained by petitioner in consequence of having to meet the unfair competition of respondent Merchants Warehouse Company were not "attributable directly to the alleged unlawful practices" of the common carrier defendant, i. e., the payment of unlawful rebates.

This finding we respectfully submit is no bar to an action afterwards brought under the Sherman Anti-Trust Law on the theory, which was sustained by the District Court after hearing the evidence, that the loss complained of had been occasioned by the acts of respondent Warehouse Company, pursuant to a conspiracy to violate the Sherman Act. As we understand the rulings of this Court to which reference is made in the opinion of the learned Court below, they hold that a complainant, having requested reparation before the Interstate Commerce Commission, in a matter over which that commission has jurisdiction, for losses sustained by reason of a violation of the Interstate Commerce Act, cannot afterwards recover *such* losses (i. e. for violation of that Act) in some other tribunal, for, as this Court has held, the Commission speaks with finality, and damages denied there cannot be recovered somewhere else. These rulings, however, do not touch the case at bar. The damages recovered in the District Court in this case were not damages for violation of the Interstate Commerce Act at all; they were damages suffered as the result of the violation of an entirely different statute by two parties jointly engaged in a conspiracy. The acts which actually caused the loss to the plaintiff were the acts of the respondent

Warehouse Company in establishing warehouse rates and practices which constituted unfair competition.

The evidence of such loss is reviewed in the opinion of the Court of Appeals (R. 662). The loss did not arise from acts of the Pennsylvania Railroad Company but resulted from the activities of the Merchants Warehouse Company in granting free service beyond the bounds of common carrier duty.

It is apparent that evidence of these losses, which resulted in an award of damages in the Sherman Act case, if presented in a proceeding before the Commission, could only result in a finding that, not being attributable to the acts or practices of the common carrier, they could not be the subject of an award of reparation made by the Commission within the limited authority it has under Sections 8 and 9 of the Interstate Commerce Act [1] to award damages "directly and solely" attributable to acts of a common carrier in contravention of that statute: *Southwestern Milling Co. v. C., R. I. & P. Ry. Co. et al.*, 161 I. C. C. 291, 292-293; *E. C. Miles Lumber Co. v. C., B. & Q. R. R. et al.*, 89 I. C. C. 761, 764; *Joynes v. P. R. R. Co.*, 17 I. C. C. 361.

The damages recovered in the Sherman Act case, therefore, were not damages that could be recovered through an award of reparation made by the Interstate Commerce Commission in any proceedings. Indeed, as the learned District Judge pointed out (R. 603), evidence of the type supporting the award in the action under the Sherman Act would not even have been admissible before the Commission, for its admission would have transformed that action into an action under the Sherman Act.

It is therefore, we submit, clear that a denial of reparation because it had not been shown that the damages had resulted directly from the payment of the unlawful re-

[1] The statutory provision is printed in full in the appendix, pages 22-23.

bates, cannot be considered to be a bar to a suit to recover damages resulting, not from the payment of such rebates, but from the acts of a non-carrier pursuant to a conspiracy to violate the Sherman Act.

It is worthy of note in this connection that this Court has held that even if the second action was expressly for violations of the Interstate Commerce Act, a plaintiff would still be allowed to recover if it were shown that acts had been done which caused it damage other than those of which complaint had previously been made before the Interstate Commerce Commission: *Louisville & Nashville R. R. Co. v. Ohio Valley Tie Co.*, 242 U. S. 288, 291. In the case at bar the evidence showed that the conspiracy complained of involved not only the unlawful rebates of which complaint was made before the Interstate Commerce Commission, but also the acts of the Railroad Company in furnishing to the Warehouse Company free of charge certain side-track facilities (R. 19, 40, 59, 69, 76, 82, 88), and in affording it freedom from demurrage charges, although the evidence showed hundreds of loaded cars were left upon the tracks upon many occasions far beyond the free time allowed by law (R. 169, 279, 369).

The learned District Judge said on this point (R. 607, 608):

> ". . . . The right of action given by the Commerce Acts is purely statutory. The conduct of common carriers engaged in interstate commerce is by those Acts subjected to supervision and acts found to be unlawful may be denounced and condemned. An injured party is given a right of action to recover reparation. There is no right of action until and only as unlawfulness is found. The Commission is given judicial or semi-

judicial power to find, when the power is invoked, the reparation to which a complainant has the right. The jurisdiction of the Commission is restricted to common carriers and its awards so limited. . . .

"The present action has a wholly different basis. It was for a charged conspiracy to monopolize the Interstate part of the warehousing business. The Commerce Acts had directly nothing to do with it. The conspiracy would have existed and the damage recovered have been wrought if the practice of the carrier had not been found to have been unlawful. The wrongfulness of the practice did not affect the existence of the conspiracy, its unlawful character or the damage suffered by the plaintiff. The Commission could award damages only against the carrier qua carrier and for some practice as carrier condemned as unlawful. It would have no jurisdiction to award damages against conspirators who were not carriers but in an unlawful conspiracy to do some act with which the Commerce Acts did not concern themselves. The fact that one of the conspirators was a carrier would not confer jurisdiction."

We therefore respectfully submit it has been clearly demonstrated that in the earlier proceeding no award could have been made by the Interstate Commerce Commission against Merchants Warehouse Company, a non-carrier, and no award could have been made even against the carrier, because the damages claimed were not directly attributable to the payment of the rebates. The business losses which plaintiff suffered were not caused directly or even indirectly by the payment of the unlawful rebates or allowances: they were due to the acts of respondent Warehouse Company which established practices and prices subjecting petitioner to ruinous competition. It is true that these practices and prices were made possible by reason of the favors granted

the Warehouse Company by respondent Railroad Company, but the independent and voluntary acts of the Warehouse Company were the cause of the loss: the payment of allowances was not of itself sufficient to enable the Warehouse Company to do what it did. It was testified by an officer of the respondent Warehouse Company that the cost of loading and unloading freight was more than the amount of allowances (R. 262); it is therefore clear from the testimony of this officer that the unfair practices which resulted in loss to the plaintiff could not have been carried on had it not been for the other benefits conferred upon the Company by respondent Railroad Company, such as freedom from demurrage, free use of side tracks, assistance in solicitation of business, etc., all of which were proven in the case at bar but were not referred to in the proceedings before the Interstate Commerce Commission.

As the damages recovered in the district court could not have been the subject of a reparation order by the Interstate Commerce Commission, the erroneous act of petitioner in requesting them is no bar to this action. That the plaintiff here mistakenly sought damages before a tribunal which was without jurisdiction to grant them does not estop it from recovering such damages in an appropriate proceeding before a tribunal which does have power to award them: *Midland Savings & Loan Co. v. Tradesmen's Nat. Bank,* 57 F. (2d) 686, certiorari denied 287 U. S. 615; *Henderson Tire & Rubber Co. v. Gregory et al.,* 16 F. (2d) 589. In the latter case the court said (p. 594):

> "The foregoing cases also establish the proposition that if the remedy first sought was not available, it is immaterial *why* this was so—whether because the assumed facts did not exist, or because the facts did not as a matter of law entitle plaintiff to the relief sought. In

either instance, the doctrine of election of remedies does not apply." See also *Southern Pacific Co. v. Bogert et al.*, 250 U. S. 483; *William W. Bierce, Ltd. v. Hutchins*, 205 U. S. 340, 346-347; *Wheeling & L. E. R. Co. et al. v. Carpenter et al.*, 264 Fed. 772, 776; *Bistline v. United States*, 229 Fed. 546.

A more general consideration leads to the same conclusion. If A sues B for personal injury sustained and fails to recover because it is shown that B did not cause the injury, this is no bar to a subsequent action against C, who, it subsequently appears, did cause it. So, in the case at bar, petitioner mistakenly alleged that its loss was the direct result of the payment of rebates by respondent railroad company and sought reparation on that theory, but it developed that its loss was due, not to the payment of rebates, but to the independent and intervening acts of a non-carrier, respondent Warehouse Company, which in turn were the result of a conspiracy of the two respondents to violate the law and injure petitioner.

It seems clear that the present action is not barred against either respondent, certainly not against the Warehouse Company from whom reparation was never asked and against whom it never could have been awarded.

The judgment of the Circuit Court of Appeals should be reversed and that of the District Court reinstated.

Respectfully submitted,

JOHN J. HICKEY,
T. R. WHITE,
WILLIAM A. SCHNADER,
WHITE, MARIS & CLAPP.

Appendix.

RELEVANT STATUTORY PROVISIONS.

Section 1 of the Sherman Act, reads as follows:

"TRUSTS, ETC., IN RESTRAINT OF TRADE ILLEGAL; PENALTY. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." (July 2, 1890, c. 647, § 1, 26 Stat. 209, 15 U. S. C. § 1.)

Section 2 of the Sherman Act, reads as follows:

"MONOPOLIZING TRADE A MISDEMEANOR; PENALTY. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." (July 2, 1890, c. 647, § 2, 26 Stat. 209, 15 U. S. C. § 2.)

Section 4 of the Clayton Act, reads as follows:

"SUITS BY PERSONS INJURED; AMOUNT OF RECOVERY. Any person who shall be injured in his business or property by reason of anything forbidden in the

anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (Oct. 15, 1914, c. 323, § 4, 38 Stat. 731, 15 U. S. C. § 15.)

A similar provision is found in the Sherman Act, § 7, restricted in its operation to the particular act.

Section 8 of the Interstate Commerce Act, reads as follows:

"LIABILITY IN DAMAGES TO PERSONS INJURED BY VIOLATION OF LAW. In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case." (Feb. 4, 1887, c. 104, § 8, 24 Stat. 382, 49 U. S. C. § 8.)

Section 9 of the Interstate Commerce Act, reads in part as follows:

"Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the dam-

ages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt." (Feb. 4, 1887, c. 104, § 9, 24 Stat. 382, 49 U. S. C. § 9.)

Section 10 (4) of the Interstate Commerce Act reads in part as follows:

"If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce any common carrier subject to the provisions of this chapter, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination . . . such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom. (Feb. 4, 1887, c. 104, § 10, 24 Stat. 382; Mar. 2, 1889, c. 382, § 2, 25 Stat. 857; June 18, 1910, c. 309, § 10, 36 Stat. 549; and Feb. 28, 1920, c. 91, § 414, 41 Stat. 483; 49 U. S. C. § 10 (4).)

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IN THE

Supreme Court of the United States

No. 351. **October Term, 1935.**

TERMINAL WAREHOUSE COMPANY (Plaintiff-Appellee in the Court Below),

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY and MERCHANTS WAREHOUSE COMPANY (Defendants-Appellants in the Court Below),

Respondents.

Brief on Behalf of Petitioner.

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INDEX.

	PAGE
I. REFERENCES TO THE OPINIONS OF THE COURTS AND OF THE INTERSTATE COMMERCE COMMISSION, RELATIVE TO THIS AND A PRIOR PROCEEDING..	1
II. STATEMENT OF THE CASE.....	3
III. SPECIFICATION OF ERRORS.....	9
IV. THE QUESTIONS PRESENTED.....	9
V. SUMMARY OF ARGUMENT.....	11
VI. ARGUMENT	13
1. The Denial of Reparation by the Interstate Commerce Commission Was Not a Bar to the Subsequent Suit Under the Sherman Act...	13
2. The Evidence Sustains the Verdict of the Jury That a Contract, Combination or Conspiracy Existed to Violate the Sherman Act..	28
3. The Evidence Supports the Verdict of the Jury as to the Damage Suffered.....	33
4. Conclusion	38

TABLE OF CASES CITED.

Allison v. Hobbs, 96 Me. 26, 51 Atl. 245 37

Anderson v. Minn., St. P. & S. S. M. Ry. Co., 146 Minn. 430, 179 N. W. 45 37

Anderson v. Shipowners Association of the Pacific Coast et al., 272 U. S. 359 31

Ash Sheep Co. v. United States, 252 U. S. 159 19

Bailey v. Pennsylvania Railroad Company et al., 4 Fed. Supp. 786 1

Baltimore Steamship Co. v. Phillips, 274 U. S. 316 ... 28

Bigelow v. Old Dominion Copper Co., 225 U. S. 111 .. 17

Binderup v. Pathe Exchange, 263 U. S. 291 33

Bistline v. United States, 229 Fed. 546 19

Chattanooga F. & P. Works v. Atlanta, 203 U. S. 390. 33

Corey v. Havener, 182 Mass. 250, 65 N. E. 69 37

Dusenberry v. Lehigh Valley R. R. Co. et al., 268 Fed. 1009 16

Eastman Kodak Co. v. Southern Photo Co., 273 U. S. 359 18

Gallagher v. Pennsylvania Railroad Company, 160 I. C. C. 563 2,7

Gannaway et al. v. Illinois Central R. R. Co. et al., 120 I. C. C. 400 21

Garrison v. Sun Printing and Publishing Assn., 207 N. Y. 1 21

Graves v. C. & S. Telegraph Association, 132 Fed. 387. 37

Gulf C. and S. F. Ry. Co. v. Cities Service Co., 273 Fed. 946 37

Henderson Tire & Rubber Co. v. Gregory et al., 16 F. (2d) 589 19

Hood Rubber Co. v. United States Rubber Co., 229 Fed. 583 33

Interstate Commerce Commission v. United States ex rel. Campbell, 289 U. S. 385 26

TABLE OF CASES CITED—Continued.

	PAGE
Kingston v. Chi. & N. W. Ry. Co., 191 Wis. 610, 211 N. W. 913	37
Larsen v. Northland Transportation Co., 292 U. S. 20.	19
Local 167 v. United States, 291 U. S. 293	33
McDonald v. McAdams, 151 Fed. 781	18
Merchants Warehouse Company v. United States et al., 44 F. (2d) 379	2
Merchants Warehouse Company v. United States et al., 283 U. S. 501	2, 7, 30
Midland Savings & Loan Co. v. Tradesmen's Nat. Bank, 57 F. (2d) 686, (certiorari denied 287 U. S. 615)	19
Milwaukee & St. Paul Ry. Co. v. Kellogg, 94 U. S. 469.	21
Montague & Co. v. Lowry, 115 Fed. 27 (affirmed 193 U. S. 38)	31
Motley, Green & Co. v. Detroit Steel & Spring Co., 161 Fed. 389	18
New York, N. H. & H. R. Co. v. Interstate Com. Com., 200 U. S. 361	32
Nirdlinger v. American District Telegraph Co., 245 Pa. 453	21
Pennsylvania Railroad Co. et al. v: Terminal Warehouse Company, 78 F. (2d) 591	2, 9
Pittwood v. Northern Pacific R. R. Co., 51 I. C. C. 535	21
Procter & Gamble Co. v. United States et al., 225 U. S. 282	26
Ramsay Co. v. Associated B. P. of U. S. and C., 271 Fed. 140 (reversed on other grounds, 260 U. S. 501)	33
Scott v. Saunders, 290 Fed. 30	18
Sessions v. Johnson, 95 U. S. 347	18
Southern Pacific Co. v. Bogert et al., 250 U. S. 483	19

TABLE OF CASES CITED—Continued.

PAGE

Standard Oil Co. v. United States et al., 283 U. S. 235 26
Stone v. Dickinson, 87 Mass. 29 37
Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555 ..... 18, 35, 36
Sullivan v. Associated B. & D. of U. S., 272 Fed. 323 (reversed on other grounds, 6 F. (2d) 1000) 33
Swift and Company v. United States, 196 U. S. 375.. 32
Terminal Warehouse Company v. Pennsylvania Railroad Company et al., 7 Fed. Supp. 484 2
Texas Sugar Refining Co. v. Beaumont, Sour Lake & Western Ry. Co. et al., 152 I. C. C. 133 21
Troxell v. D. L. & W. Railroad Co., 227 U. S. 434.... 28
United States v. E. C. Knight Co., 156 U. S. 1..... 31
United States v. Joint Traffic Assn., 171 U. S. 505.... 32
United States v. Patten, 226 U. S. 525 31
United States v. Standard Oil Co. of New Jersey, 47 F. (2d) 288 31
United States v. Trans-Missouri Freight Assn., 166 U. S. 290 32
United States Copper Securities Co. v. Amalgamated Copper Co., 232 Fed. 574 33
Vandiver & Co. v. Pollak, 107 Ala. 547, 19 So. 180.... 37
Wheeling & L. E. R. Co. et al. v. Carpenter et al., 264 Fed. 772 19
William H. Rankin Co. v. Associated Bill Posters of U. S. etc., 42 F. (2d) 152; (certiorari denied, 282 U. S. 864) 36
William W. Bierce, Ltd. v. Hutchins, 205 U. S. 340.. 19

TABLE OF STATUTES CITED.

PAGE

Act of February 4, 1887, c. 104, 24 Stat. at L. 382 (Interstate Commerce Act), as amended....7, 8, 10, 11, 13, 14, 15, 16, 18, 19, 20, 21, 22, 24, 26, 27

Act of July 2, 1890, c. 647, 26 Stat. at L. 209 (Sherman Anti-Trust Act).....3, 9, 10, 11, 13, 14, 16, 17, 19, 20, 26, 27, 28, 31, 32, 33, 38

Act of October 15, 1914, c. 323, 38 Stat. at L. 731 (Clayton Act) 3, 4, 17

IN THE

Supreme Court of the United States.

No. 351. October Term, 1935.

TERMINAL WAREHOUSE COMPANY (PLAINTIFF-APPELLEE IN THE COURT BELOW),

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY AND MERCHANTS WAREHOUSE COMPANY (DEFENDANTS-APPELLANTS IN THE COURT BELOW),

Respondents.

BRIEF ON BEHALF OF PETITIONER.

I. REFERENCES TO THE OPINIONS OF THE COURTS AND OF THE INTERSTATE COMMERCE COMMISSION, RELATIVE TO THIS AND A PRIOR PROCEEDING.

Opinions of the District Court.

All of which were written by Judge Oliver B. Dickinson—

Dismissing statutory demurrers, filed November 2, 1932. Record 96. Reported as *Bailey v. Pennsylvania Railroad Company, et al.*, 4 Fed. Supp. 786.

Granting petitioner's motion for production of writings, under 28 U. S. C. § 636, filed October 20, 1933. Record 129. Not reported.

Dismissing motion for new trial. Two opinions were filed, May 8, 1934, and June 1, 1934. Record 598, 605. Reported as *Terminal Warehouse Company v. Pennsylvania Railroad Company, et al.*, 7 Fed. Supp. 484.

Sur rule for judgment for treble damages and for allowance of counsel fees, filed June 22, 1934. Record 625. Not reported.

Opinion of the Circuit Court of Appeals for the Third Circuit.

Written by Judge Thompson (Judges Buffington and Davis sitting with him), filed July 10, 1935, reversing the judgment of the District Court. Record 658. Reported as *Pennsylvania Railroad Company, et al. v. Terminal Warehouse Company*, 78 F. (2d) 591.

Report of Interstate Commerce Commission in Prior Proceeding.

Issuing cease and desist order and denying claim for reparation. Record 476. Reported as *Gallagher v. Pennsylvania Railroad Company*, 160 I. C. C. 563.

Opinion of Statutory Court in Prior Case.

Sustaining the opinion of the Commission, reported as *Merchants' Warehouse Co. v. United States, et al.*, 44 F. (2d) 379.

Opinion of This Court in Prior Case.

Affirming the decision of the Statutory Court, reported as *Merchants' Warehouse Company v. United States, et al.*, 283 U. S. 501.

II. STATEMENT OF THE CASE.

This is an action at law by petitioner, Terminal Warehouse Company, against respondents, Pennsylvania Railroad Company and Merchants Warehouse Company, to recover damages for injuries suffered in consequence of respondents' violation of Sections 1 and 2 of the Sherman Anti-Trust Act.

Damages are recoverable under Section 4 of the Clayton Act for injuries caused by

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." (Section 1 of the Sherman Act.)

and by a violation of the prohibition

> " . . . to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." (Section 2 of the Sherman Act.)

Sections 1 and 2 of the Sherman Act and 4 of the Clayton Act are printed in full in the margin.[1]

---

[1] *Section 1 of the Sherman Act,* reads as follows:

"TRUSTS, ETC., IN RESTRAINT OF TRADE ILLEGAL; PENALTY. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." (July 2, 1890, c. 647, § 1, 26 Stat. 209, 15 U. S. C. § 1.)

Section 2 of the Sherman Act, reads as follows:

"MONOPOLIZING TRADE A MISDEMEANOR; PENALTY. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." (July 2, 1890, c. 647, § 2, 26 Stat. 209, 15 U. S. C. § 2.)

Petitioner is engaged in the public warehousing business. It maintains eleven large warehouses served by railroad sidings. (R. 179.) The business of a public warehouseman consists in receiving, storing, handling, shipping, reshipping, and distributing package freight. Such freight when received at his warehouses from the carriers is ordinarily in carload lots, and is distributed, usually in less than carload lots, to his customers, goods as to which immediate delivery is not desired being stored. (R. 175-183.) The public warehouseman serves the double purpose of furnishing storage facilities for customers who do not have warehouses of their own and enabling customers to receive shipments of goods at carload rates, although, except for the services of the warehouseman, freight rates at the higher "less than carload" rates would have to be paid. (R. 176.)

The warehouseman also performs incidental services, such as loading and unloading freight, separating the packages destined for his customers, recooperage and reconditioning of injured packages, payments of freight rates on behalf of customers, and other such matters. (R. 180-182.)

The advantage to the customer consists in the accommodation which he receives in the matter of handling and storage of goods and in being given the advantage of carload rates for freight, the reduction in freight rates being generally sufficient to pay for the cost of handling, distribution and incidental services where the goods are not put in storage. (R. 176-177.)

Section 4 of the Clayton Act, reads as follows:

"SUITS BY PERSONS INJURED; AMOUNT OF RECOVERY. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (Oct. 15, 1914, c. 323, § 4, 38 Stat. 731, 15 U. S. C. § 15.)

A similar provision is found in the Sherman Act, § 7, restricted in its operation to the particular act.

Respondent, Merchants Company, is in the same business as petitioner and maintains about the same number of warehouses. (R. 156.) There are other warehouse companies operating in Philadelphia. Respondent railroad company is a common carrier; its lines extend to most of the important centres of population in Eastern United States. (R. 154.)

The two respondents made a series of contracts beginning many years ago, which provided in effect that the Merchants Company would give to the Railroad Company all the shipments it could control, would accord preferential treatment to traffic moving over the lines of the Railroad Company, and would not extend the use of its facilities to traffic of any other railroad. In return the Railroad Company agreed to pay the Merchants Company certain sums (herein referred to as "allowances"), ostensibly for services rendered in connection with the receipt and delivery of freight at its warehouses, and to furnish siding connections and facilities without expense to the Merchants Company. (Plaintiff's Exhibit 1, R. 18-93.) In certain of the agreements the Railroad Company also contracted not to enter into similar arrangements with any other warehouse company. (R. 60.)

These contracts were carried out by both parties for many years. Practically all freight destined to or coming from the warehouses of the Merchants Company was routed over the lines of the Railroad Company (Defendants' Exhibit 6, R. 273, 443-449); the Railroad Company fully carried out its part of the agreement, did not enter into similar arrangements with any other competitive warehouse company and did not pay any allowances to any other competitive company.

In order further to promote the purposes of the contracts the Railroad Company designated the warehouses of the Merchants Company as freight stations (R. 371-372) and actively solicited freight to be consigned thereto. (Plaintiff's Exhibit 3, R. 154.) It also permitted inbound loaded cars consigned to Merchants Company to remain on its tracks for an unlimited time without demurrage charges (R. 169, 279, 369).

The Railroad Company owned a considerable block of the stock of the Merchants Company (R. 140). It profited by the freight charges on the increased volume of freight moving over its lines to and from the Merchants Warehouses; the Merchants Company in turn profited by the payment of allowances to it which during the period in suit amounted to $634,886.16 (R. 248), and by the increased volume of business it enjoyed owing to its ability, by reason of the favors it received, to quote lower prices than its competitors.

As expressed in one of the opinions of the District Court—

> "Beyond all doubt this arrangement was not only directly profitable to the favored warehouseman but it gave it possession of a weapon for use in its fight with its competitors for business. The carrier and the warehouseman were both selfishly interested in extending the business of the latter to the point, if possible of attainment, of an absolute monopoly of the whole warehousing business." (R. 599.)

Petitioner proved that by reason of the "allowances" and other concessions the Merchants Company could and did give free loading, unloading, handling and distribution services to its customers upon a considerable portion of their business, and otherwise cut its normal rates. (R. 158,

159, 187, 189, 239, 241, 243, 276-277, 333, 335, 338, 352, 354, 357, 360, 363); that it could and did free its customers from charges for demurrage (R. 163, 239, 240, 243, 311-313, 357-358, 364), and that petitioner, in order to meet this competion was obliged to absorb demurrage charges, to give free loading, unloading, handling and distribution service in certain cases although it received no allowances, and otherwise to lower its rates below a fair charge. (R. 189-190, 196.) This necessarily resulted in a heavy financial loss. The amount of the loss was proven in a very precise manner by showing in detail the tonnage of freight which had passed through petitioner's warehouse during the period in suit, the amount of the charges which petitioner had been able to collect thereon, and the amount which it would have been able to obtain had it not been for the unfair competition. An elaborate computation submitted by petitioner showed actual damages of this character amounting to $536,278.35. (R. 235-237.)

Many of the facts shown by the record in this case were reviewed by this Court in *Merchants' Warehouse Company v. United States, et al.*, 283 U. S. 501, in which this Court affirmed an order of the Interstate Commerce Commission, which required respondent railroad company, among other carriers, to "cease and desist" from the continued payment of allowances (see *Gallagher v. Pennsylvania Railroad Company*, 160 I. C. C. 563).

In the proceedings before the Interstate Commerce Commission, petitioner had requested reparation for the violations of the Interstate Commerce Act disclosed in that proceeding, which related in part to an earlier date than the acts complained of in the case at bar. Reparation was denied on the correct ground that the business losses peti-

tioner sought to recover were not "attributable directly" to the violations of the Interstate Commerce Act shown in that case (160 I. C. C. at 569).

Respondents' contention that the refusal of reparation barred a recovery in the case at bar having been overruled, the question was submitted to the jury upon petitioner's claim that the facts briefly outlined above disclosed a combination or conspiracy between the two respondents in restraint of trade or commerce among the several states, and to monopolize or attempt to monopolize the warehouse business in the Philadelphia district.

The Trial Judge submitted three questions to the jury:

(1) "Have these Defendants conspired or combined in an unlawful combination or conspiracy in restraint of trade, or to create or promote a monopoly in matters which concern interstate commerce?" (R. 543.)

(2) "Has the Plaintiff suffered any loss in business or property by reason of that unlawful combination if you find the unlawful combination to exist." (R. 544.)

(3) If you find in favor of the plaintiff "how much shall be your verdict." (R. 544.)

The verdict of the jury was in favor of petitioner in the amount of $136,125.00.

Motions for a new trial were overruled. The Court on motion trebled the amount of the verdict, allowed a counsel fee of $27,000.00, and directed the entry of judgment in the amount of $410,338.81.

On appeal from this judgment, the Court of Appeals for the Third Circuit reversed the case on the sole ground that the petitioner's right of action was barred by the prior pro-

ceeding before the Interstate Commerce Commission (*Pennsylvania Railroad Co., et al. v. Terminal Warehouse Company,* 78 F. (2d) 591—Record 658).

The case is now here on certiorari granted October 14, 1935.

III. SPECIFICATION OF ERRORS.

The Circuit Court of Appeals for the Third Circuit erred:

1. In its finding as follows: "We conclude that the present action is barred by the prior proceedings before the Interstate Commerce Commission."

2. In its order reading as follows: "Judgment Reversed."

3. In failing to affirm the judgment of the District Court.

IV. THE QUESTIONS PRESENTED.

1. In an action at law against a carrier and a non-carrier to recover damages suffered as the result of a conspiracy to violate the Sherman Act, is the action barred as to the non-carrier by a denial of reparation to the injured party in a prior proceeding against the carrier before the Interstate Commerce Commission, in which proceeding the non-carrier intervened for the protection of its own interests, but in which no reparation was claimed or could have been awarded against the non-carrier?

2. In such a case is the action barred as to either party because in the previous proceeding before the Interstate Commerce Commission the injured party requested and was denied reparation which the Commission had no statutory authority to award?

3. In such a case is the suit against the carrier barred because in the previous proceeding reparation for injuries suffered was denied on the ground, as announced by the Commission, that the injuries sustained were not "attributable directly" to violations of the Interstate Commerce Act of which complaint was made, and which led to a cease and desist order?

4. Whether the evidence sustains the verdict of the jury in this case, that a conspiracy to violate the Sherman Act existed and that the damages awarded by the jury were suffered.

V. SUMMARY OF ARGUMENT.

1. The Denial of Reparation by the Interstate Commerce Commission Was Not a Bar to the Subsequent Suit Under the Sherman Act.

The proceeding before the Interstate Commerce Commission was filed by petitioner against respondent Railroad Company to stop the practice of paying allowances to respondent Merchants Company, and included a prayer for reparation. Respondent, Merchants Company, was not a party to the proceeding, although it voluntarily intervened. The refusal of the prayer for reparation could not under any circumstances bar a subsequent suit against the Merchants Company because the Interstate Commerce Commission had no statutory authority to award reparation against the Merchants Company even if it had been requested.

Neither was the denial of reparation in said proceeding a bar to a subsequent action against both respondents for injuries for violation of the Sherman Act. The Commission had no statutory authority to award the damages claimed even against respondent Railroad Company, because, as the Commission found, they were not "attributable directly" to the unlawful violations of the Interstate Commerce Act of which complaint was made. The action in the case at bar is for damages resulting from the conspiracy to violate the Sherman Act, and the injuries were directly attributable to that cause.

2. The Evidence Sustains the Verdict of the Jury That a Contract, Combination or Conspiracy Existed to Violate the Sherman Act.

The evidence showed that the two respondents had made an agreement whereby respondent Railroad Company granted certain favors to the Merchants Com-

pany and not to other warehouses on its lines, including allowances ostensibly for handling freight, the furnishing of free siding connections and facilities, active assistance in the solicitation of warehouse freight, and permission to allow inbound loaded cars to remain indefinitely upon its tracks without demurrage charges, and whereby respondent Merchants Company agreed to give to respondent Railroad Company all the shipments it could control, to accord preferential treatment to traffic moving over the Railroad Company's lines and not to extend the use of its facilities to traffic of other railroads. The principal part of warehouse freight moving in and out of the warehouses of the Merchants Company was interstate in character. The agreement was carried out by both parties and respondent Merchants Company made full use of the advantages and favors granted it by establishing unfair rates and practices which diverted business from other warehouses and from other carriers, and tended to create a monopoly.

3. The Evidence Supports the Verdict of the Jury as to the Damage Suffered.

The evidence clearly showed that in carrying out the conspiracy aforesaid respondent Merchants Company established grossly unfair warehouse rates and practices, involving the furnishing of free service in many cases, and that in consequence thereof the petitioner suffered heavy loss in the actual handling of business which passed through its warehouses during the period in suit. No claim was made for business which petitioner lost in consequence of unfair competition, but only actual pecuniary loss sustained by reason of the necessity of giving free service or lowering its rates to meet the unfair competition aforesaid. The verdict was very moderate in amount and no complaint is made of the Judge's charge.

VI. ARGUMENT.

1. The Denial of Reparation by the Interstate Commerce Commission Was Not a Bar to the Subsequent Suit Under the Sherman Act.

The proceeding held by the learned Circuit Court of Appeals to bar petitioner in this action was begun in 1928 by the filing of a formal complaint with the Interstate Commerce Commission assailing the payment of allowances by the Pennsylvania Railroad Company as illegal and praying for reparation (R. 451). Respondent Railroad Company was the only defendant in that proceeding, although respondent Merchants Company voluntarily intervened for the protection of its interests (R. 473-475).

Petitioner, in connection with the presentation of its case offered evidence of shrinkage or diminution of its normal business profits due to the unfair competition it encountered (R. 484, 494-498). The Commission ruled that the allowances constituted unlawful rebates, but, upon application by petitioner for a further hearing at which it proposed to offer evidence of the amount of loss sustained by it, held that such further hearing should be refused, stating that the proof which had been submitted was "too vague and indefinite to warrant the conclusion that complainants have suffered actual pecuniary loss attributable directly to the alleged unlawful practices." (R. 484.) Reparation was therefore denied.

It is this ruling by Division 3 of the Interstate Commerce Commission (R. 476-485) which the court below holds bars the petitioner from prosecuting the case at bar, which is an action at law for violation of the Sherman Act, brought against the carrier involved in the proceedings be-

fore the Interstate Commerce Commission and also against a non-carrier which was not named as a defendant in that case, although it voluntarily intervened.

There are several respects in which we urge that the learned Court of Appeals for the Third Circuit erred in reaching its conclusion.

Its decision was based on the assumption that petitioner in the proceeding before the Interstate Commerce Commission could have recovered the damages alleged, had its evidence been sufficient, not only against respondent Railroad Company but also against respondent Merchants Company. The Court's language on the latter point was:

> "Merchants voluntarily became a party to that proceeding, thus enabling the complainants, including Terminal, to press their claim against the favored shipper as well as against the carrier." (R. 661.)

The Court of Appeals therefore concluded that as, in its view, petitioner could have recovered against both respondents had its evidence been sufficient, it could not thereafter recover against either in an action under the Sherman Act in another tribunal.

It is respectfully submitted that in so holding the Court of Appeals erred in two particulars: (1) In holding that a reparation claim could have been successfully urged before the Commission against Merchants Warehouse Company, a non-carrier; (2) In holding that *any* award of reparation could have been made against either respondent in view of the fact found by the Commission that the damages suffered were not "*attributable directly*" to the payment of allowances which was the violation of the Interstate Commerce Act of which complaint was made. These two points will be considered in order.

(1) Sections 8 and 9 of the Interstate Commerce Act, printed in full in the margin,[2] expressly provide that the remedy afforded by that act to the party injured shall be against the common carrier guilty of violation of said act. These are the only sections of that act which confer a right upon a party injured to recover reparation by award of the Commission, and the only statutory authority enabling the Commission to award reparation.

Section 8 provides that "in case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful . . . such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter."

This is the clause quoted by the learned Court of Appeals for the Third Circuit as permitting full damages to be recovered, whatever they may be, and it is clear that it

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[2] *Section 8 of the Interstate Commerce Act* reads as follows:

"LIABILITY IN DAMAGES TO PERSONS INJURED BY VIOLATION OF LAW. In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case." (Feb. 4, 1887, c. 104, § 8, 24 Stat. 382, 49 U. S. C. § 8.)

Section 9 of the Interstate Commerce Act reads as follows:

"Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt." (Feb. 4, 1887, c. 104, § 9, 24 Stat. 382, 49 U. S. C. § 9.)

refers only to the recovery of damages against a common carrier.

Section 9 is equally clear, giving a right of action to any "persons claiming to be damaged by any common carrier subject to the provisions of this chapter" with the proviso that such person may either make complaint before the Commission for carrier liability only, or bring suit in court, but cannot do both.

With great respect for the opinion of the learned Court below, we contend that its holding that a reparation claim could have been successfully pressed against the Merchants Company was error. There is no provision in the act whereby the Commission may award reparation against anyone other than a carrier.

Congress has provided otherwise for cases in which it is claimed that a non-carrier is liable for damages suffered by a shipper. An action at law may be brought in court, where the non-carrier has induced or solicited the payment of unlawful rebates, under Section 10(4) of the Interstate Commerce Act (printed in the margin [3]): *Dusenberry v. Lehigh Valley R. R. Co., et al.*, 268 Fed. 1009; or, in case the non-carrier has conspired with the carrier to violate the Sherman Anti-Trust Law, a suit may be brought under

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[3] *Section 10 (4) of the Interstate Commerce Act,* reads in part as follows:

"If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce any common carrier subject to the provisions of this chapter, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination . . . such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom. (Feb. 4, 1887, c. 104, § 10, 24 Stat. 382; Mar. 2, 1889, c. 382, § 2, 25 Stat. 857; June 18, 1910, c. 309, § 10, 36 Stat. 549; and Feb. 28, 1920, c. 91, § 414, 41 Stat, 483; 49 U. S. C. § 10 (4).)

Section 4 of the Clayton Act (printed in full in the margin [4]).

It is quite clear, however, that the liability of a non-carrier cannot be made the basis of an award by the Interstate Commerce Commission.

Moreover, reparation was sought only against the carrier, respondent Railroad Company, not against the non-carrier (R. 451, 486). Even if the Commission had the power to award reparation against the non-carrier, it could not award it where it was not sought.

The fact that the non-carrier intervened for its own purposes as above noted does not affect this conclusion. The claim for reparation was pressed only against the Railroad Company; the record indicates that the Merchants Company took no part in this branch of the case (Defendants' Exhibit 12, R. 450-523).

Aside from these considerations, which relate only to the terms of the statutes, it is well settled that a suit against one of two joint tort-feasors which does not result in a recovery and a satisfaction of judgment, is no bar to a suit against the other (*Bigelow v. Old Dominion Copper Co.*, 225 U. S. 111), and this is true even though, as in the case cited, both joint tort-feasors participated in the defense of the first suit which resulted favorably to the defendant. Ibid, page 126.

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[4] *Section 4 of the Clayton Act*, reads as follows:

"SUITS BY PERSONS INJURED; AMOUNT OF RECOVERY. Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (Oct. 15, 1914, c. 323, § 4, 38 Stat. 731; 15 U. S. C. § 15.)

A similar provision is found in the Sherman Act, § 7, restricted in its operation to the particular act.

Petitioner could have proceeded against the Merchants Warehouse Company as the sole defendant in the case at bar, naming the Pennsylvania Railroad Company as the other conspirator in its complaint, or it could have dismissed its complaint insofar as the Pennsylvania Railroad Company was involved and claimed all of its damages from the Merchants Warehouse Company which, as one of the joint tort-feasors, was liable for all or any part of the damage: *Story Parchment Co. v. Paterson Co.*, 282 U. S. 555; *Eastman Kodak Co. v. Southern Photo Co.*, 273 U. S. 359; *Sessions v. Johnson*, 95 U. S. 347; *Scott v. Saunders*, 290 Fed. 30, 33; *Motley, Green & Co. v. Detroit Steel & Spring Co.*, 161 Fed. 389, 397; *McDonald v. McAdams*, 151 Fed. 781.

We submit, therefore, that there is no basis whatever for the decision of the learned Circuit Court of Appeals that petitioner is barred from proceeding against the Merchants Company because it requested the Interstate Commerce Commission to make an order of reparation against the Railroad Company, which request was refused. Its action in reversing the judgment against the Merchants Company on this ground could, therefore, in no event be sustained.

(2) In this case, however, we submit that petitioner is not barred against either respondent by anything which was done in the proceedings before the Interstate Commerce Commission.

The opinion of the learned Circuit Court of Appeals for the Third Circuit is based on the assumption that petitioner had elected its remedy and that, under the provisions of Section 9 of the Interstate Commerce Act (quoted in full in the margin, supra page 15), it could not afterwards pursue any other remedy in another tribunal.

A necessary prerequisite to the application of this rule, however, is the jurisdiction of the Commission to award the damages claimed. If it has no such jurisdiction, the reparation claim filed with the Commission may be treated as a nullity, and the claimant may pursue such other remedy as he finds available. *Ash Sheep Co. v. United States,* 252 U. S. 159; *Larsen v. Northland Transportation Co.,* 292 U. S. 20; *Midland Savings & Loan Co. v. Tradesmen's Nat. Bank,* 57 F. (2d) 686, certiorari denied 287 U. S. 615; *Henderson Tire & Rubber Co. v. Gregory et al.,* 16 F. (2d) 589. In the case last cited the court said (p. 594):

> "The foregoing cases also establish the proposition that if the remedy first sought was not available, it is immaterial *why* this was so—whether because the assumed facts did not exist, or because the facts did not as a matter of law entitle plaintiff to the relief sought. In either instance, the doctrine of election of remedies does not apply."

See also *Southern Pacific Co. v. Bogert et al.,* 250 U. S. 483; *William W. Bierce, Ltd. v. Hutchins,* 205 U. S. 340, 346-347; *Wheeling & L. E. R. Co. et al. v. Carpenter et al.,* 264 Fed. 772, 776; *Bistline v. United States,* 229 Fed. 546.

It is of course too clear for discussion that petitioner could not have recovered, in proceedings before the Interstate Commerce Commission, for damages suffered in consequence of a violation of the Sherman Anti-Trust Law.

The learned District Judge said on this point (R. 607-608):

> ". . . The right of action given by the Commerce Acts is purely statutory. The conduct of common carriers engaged in interstate commerce is by those Acts subjected to supervision and acts found to be unlawful may be denounced and condemned. An injured party

is given a right of action to recover reparation. There is no right of action until and only as unlawfulness is found. The Commission is given judicial or semi-judicial power to find, when the power is invoked, the reparation to which a complainant has the right. The jurisdiction of the Commission is restricted to common carriers and its awards so limited . . .

"The present action has a wholly different basis. It was for a charged conspiracy to monopolize the Interstate part of the warehousing business. The Commerce Acts had directly nothing to do with it. The conspiracy would have existed and the damage recovered have been wrought if the practice of the carrier had not been found to have been unlawful. The wrongfulness of the practice did not affect the existence of the conspiracy, its unlawful character or the damage suffered by the plaintiff. The Commission could award damages only against the carrier qua carrier and for some practice as carrier condemned as unlawful. It would have no jurisdiction to award damages against conspirators who were not carriers but in an unlawful conspiracy to do some act with which the Commerce Acts did not concern themselves. The fact that one of the conspirators was a carrier would not confer jurisdiction."

Respondents have argued and will, no doubt, again argue in this Court that, conceding that the causes of action are entirely different, petitioner nevertheless might have recovered the damages awarded in the case at bar in the action before the Interstate Commerce Commission, by way of reparation from the Pennsylvania Railroad Company for its unlawful payment of allowances, if its evidence had been of a nature satisfactory to the Commission, and that therefore, as damages were denied, petitioner's remedy is gone.

We turn then to the question whether the damages sustained by the petitioner and proven to the satisfaction of the jury in the case at bar, could have been recovered by way of reparation from respondent Railroad Company in the proceeding before the Interstate Commerce Commission.

It is well settled that although reparation may be awarded by the Commission for injuries to the business of a claimant, the claimant must show that some specific acts on the part of a carrier, such as the payment of rebates, constituting violations of the Interstate Commerce Act, were the proximate cause of those injuries: *Texas Sugar Refining Co. v. Beaumont, Sour Lake & Western Ry. Co., et al.*, 152 I. C. C. 133, 135-136; *Gannaway et al. v. Illinois Central R. R. Co. et al.*, 120 I. C. C. 400, 403-404; *Pittwood v. Northern Pacific R. R. Co.*, 51 I. C. C. 535.[5] If the damages did *not* result from such specific acts but from an intervening cause such as the acts of a non-carrier, a situation is presented where the claim must be proven before a jury in the ordinary course of law, and damages cannot be awarded by the Commission.

In the case at bar, it appeared that the injuries suffered by the petitioner were due to unfair competition which it encountered from respondent Merchants Company. The Merchants Company established unfair warehouse rates and practices in the Philadelphia district calculated to attract business from its competitors, and to secure a monopoly for the Merchants Company of at least a large portion of warehouse package freight. These practices were such as could not be met without severe loss by any competitor who did not receive advantages, favors, and assist-

[5] The general principles governing proximate causation have been fully considered in *Milwaukee and St. Paul Ry. Co. v. Kellogg*, 94 U.S. 469; *Nirdlinger v. American District Telegraph Co.*, 245 Pa. 453; and *Garrison v. Sun Printing and Publishing Assn.*, 207 N. Y. 1, 7.

ance from the carrier, which advantages, favors, and assistance were afforded the Merchants Company in aid of the conspiracy alleged and proven in this case. The motive on the part of the Railroad Company was to gain traffic, and the motive on the part of the Merchants Company was to gain increased business. The conspiracy necessarily involved diverting interstate commerce from the lines of other carriers, and at least tended to secure for the Merchants Company the monopoly of the warehouse business in the Philadelphia district.

If it had not been for the joint purpose of the two conspirators to accomplish these purposes it would not have been necessary for the Merchants Company to go to the extremes to which it did go in offering favors, advantages and lowered rates to its customers and to establish practices which could not possibly be met by other warehouse companies without heavy loss. It was clearly demonstrated that the Merchants Company (and one other warehouse company favored by another railroad) secured a practical monopoly of the "heavy density" business, consisting of bags of flour, bags of cement, and other such products because as to them no other warehouse company could absorb the heavy cost of handling a large portion thereof, as it was necessary to do in order to meet the competition of the Merchants Company (R. 195-196). There can be no question as to the reality of the loss which would necessarily be sustained by competitors of the Merchants Company in attempting to do business under these conditions. There is no doubt of the severe loss which petitioner has sustained. The question now before us is whether this loss and injury is such as can be said to have resulted from specific violations of the Interstate Commerce Act by the Railroad Company.

A brief consideration of the facts makes it clear that there was an independent cause which occasioned the damage suffered, to wit, the conspiracy aforesaid and the acts of the Merchants Company in pursuance thereof. The loss sustained was not due directly to the payment of any allowances but to the necessity of meeting the standards set up by the Merchants Company. It is clear from the testimony that it is impossible to say that the allowances received by the Merchants Company were "passed along" to its customers in any real sense. The allowances were paid on all freight, both incoming and outgoing, handled by the Merchants Company. An officer for that company testified that the actual cost of handling freight was greater than the allowances (R. 262). The Merchants Company did not give free handling service on all its freight but only on that portion taken away within the forty-eight hours free time (R. 159, 376). The allowances received on other freight could be used otherwise. An advantage afforded by the Merchants Company to its customers, as the result of its conspiracy with the Railroad Company, almost as great as the privilege of removing their goods within forty-eight hours without charge, was the privilege of allowing the same to remain in railroad cars for many days without paying any demurrage, which the evidence shows was done throughout the statutory period in thousands of cases (R. 169, 239, 240, 243, 279, 311-313, 357-358, 364, 369. Plaintiff's Exhibit 20). This in effect gave Merchants Company an unlimited extension of its storage facilities in the cars of the carrier. The Merchants Company also had the advantage of free use of railroad facilities (Plaintiff's Exhibit 1, R. 18-93). These additional advantages were not mentioned in the complaint filed with the Interstate Commerce Commission, were not referred to in the proceedings before that tribunal,

and were, of course, not made the basis of any claim for reparation.

All of these advantages, absorbed by the Merchants Company, made possible its competitive action in obtaining warehouse business. It is impossible to trace the payment of any allowance or rebate directly into pecuniary loss to petitioner because the proximate cause of petitioner's injury was not railroad rates or allowances but the unfair warehouse practices and shrunken warehouse rates of the Merchants Company. This is well illustrated by a reference to Plaintiff's Exhibits 7, 8 and 9, letters from the Merchants Company to prospective customers offering free handling, free storage for forty-eight hours (R. 158, 159), and freedom from demurrage charges (R. 163). It was offers such as these which constituted the unfair competition petitioner was obliged to meet, and it is quite clear that it is impossible to say that the loss plaintiff suffered by reason of having to reduce its rates to meet this competition was directly attributable to the payment of allowances.

This gap between cause and effect was pointed out in the proceedings before the Interstate Commerce Commission by respondent Railroad Company in opposing petitioner's application for rehearing. It alleged in its answer that the claim for reparation must fail in the absence of proof "that the complainants have sustained damages *as a result of any infraction of the Interstate Commerce Act by the defendant in this proceeding*" (R. 501). Later in the answer it is alleged that the complainant, in order to show a right to reparation, would have to prove that its damage resulted from the fact that a subsidized warehouse "had received payment from the defendant" (R. 503). Finally, summing up its position, the Railroad Company asserts (R. 505):

> "What they [complainants] have failed to show in this case is that the alleged wrong of the Pennsylvania operated to their injury. They leave wholly uncertain the answer to the question: 'Which act of which carrier is supposed to have injured any particular complainant in any specific transaction?' "

These arguments of respondent Railroad Company convinced the Commission that the injuries unquestionably shown in that case as in this (the Circuit Court of Appeals says the evidence of injury was the same in both, R. 663) were not caused directly or proximately by the payment of rebates and therefore that the Commission had no jurisdiction to award them. The conclusion of the Commission was expressed in the following words:

> "The evidence is far too vague and indefinite to warrant the conclusion that complainants have suffered actual pecuniary loss attributable directly to the alleged unlawful practices" (R. 484.)

This conclusion was clearly not a finding that no injury had been suffered by petitioner, which under the admitted facts would be impossible, but only that the injuries which it had shown were not "*attributable directly*" to the alleged practices of which complaint had been made; in other words, that the payment of the allowances was not the proximate cause of the injuries which petitioner suffered.

Respondents argue in their brief in opposition to the petition for writ of certiorari that petitioner did not prove any injuries in the case before the Interstate Commerce Commission. This argument can have little weight in view of the statement in the opinion of the learned Circuit Court of Appeals to the effect that the testimony to prove damages in both cases was substantially the same, the testimony being well summarized by the court (R. 662). The evidence pre-

sented to the Commission did prove beyond question that complainant had been injured: what it failed to show was that that injury was directly attributable to the unlawful practices of the carrier there complained of. On the contrary, the evidence showed that the injuries were not directly attributable to such practices, but that they were caused by acts of the Merchants Company, a non-carrier, and any additional evidence presented would (as has been clearly demonstrated by the evidence produced in the case at bar) only have emphasized the fact that the proximate cause of petitioner's unquestioned injury was not any act of the common carrier constituting a violation of the Interstate Commerce Act, but acts of the Merchants Company, a non-carrier, pursuant to a conspiracy in violation of the Sherman Act. The injuries were, therefore, not compensable in an action before the Commission. The Commission so ruled and the decisions of the District Court in the case at bar are in harmony with that ruling. The holding of the Circuit Court of Appeals that the damages for which compensation was given in the case at bar could have been recovered in the action before the Commission is, therefore, at variance not only with the decisions of the District Court in the case at bar, but with that of the Commission in the former proceedings.

Petitioner, of course, could not appeal from the Commission's decision: *Interstate Commerce Commission v. United States ex rel. Campbell,* 289 U. S. 385, 388; *Standard Oil Co. v. United States et al.,* 283 U. S. 235, 238; *Procter & Gamble Co. v. United States et al.,* 225 U. S. 282; although the learned Court below refers to its failure to appeal as if that fact were significant (R. 662).

Petitioner, on the other hand, accepted this decision as a definite finding that its injuries were not of such a nature

as could be the basis of an award by the Interstate Commerce Commission, and considered the finding of the Commission to be a denial of its jurisdiction to award such damages. It thereupon filed this suit to recover upon an entirely different cause of action, alleging the true cause of its injuries to be the conspiracy aforesaid. Now the Railroad Company, reversing its position before the Commission, argues that petitioner could have recovered reparation before the Commission for the injuries which it unquestionably sustained. In its brief in opposition to the petition for writ of certiorari (p. 15) the Railroad Company asserts that it did not question the power of the Commission to award reparation, but the above quoted excerpts from its answer to the petition for rehearing clearly show otherwise.

The fallacy of the argument presented here by respondents is clearly shown by one sentence in their brief in opposition to the writ for certiorari (page 23) in which they say:

> "Having elected to pursue its remedy under the Interstate Commerce Act, petitioner was restricted to recovery under that Act."

This statement, if correct, would lead to the conclusion that although a petitioner had mistakenly sued to recover damages for violation of the Sherman Law before the Interstate Commerce Commission, and the Commission had very properly denied its jurisdiction it could not thereafter have sued in court, a proposition which carries its own answer.

It has been repeatedly held, as we have previously pointed out (supra, page 19) that a proceeding in one court in which judgment could not have been recovered because of lack of jurisdiction or for some similar reason, is no bar to subsequent action in another court, and it is equally well settled that where the cause of action in the second suit differs in substance from that in the first suit,

a judgment in the first case is not a bar to the second, even though the injuries sued for in both cases were exactly the same: *Troxell v. D. L. & W. Railroad Co.*, 227 U. S. 434, 442-443; *Baltimore Steamship Co. v. Phillips*, 274 U. S. 316, 319.

We further suggest that if the decision of the Interstate Commerce Commission were to be considered binding upon the parties in this suit, it could be binding only as to what the Commission actually decided, which was that the injuries shown were not "*attributable directly*" to the payment of the allowances. This is a finding by a competent tribunal to the effect that the injuries suffered in this case could not be awarded by the Interstate Commerce Commission because they were not such as that Commission has jurisdiction to award.

We therefore submit in concluding this branch of the argument: (1) That the denial of reparation by the Interstate Commerce Commission does not bar a subsequent action against the Merchants Company from whom no reparation was asked and against whom it could not have been awarded. (2) That such denial is not a bar to subsequent proceedings under the Sherman Anti-Trust Law against both respondents, because the Commission, as it found, had no jurisdiction to award the reparation requested, and for the further reason that the causes of action in the two cases are entirely different.

2. The Evidence Sustains the Verdict of the Jury That a Contract, Combination or Conspiracy Existed to Violate the Sherman Act.

Respondents contended in the court below and allege in their brief in opposition to the petition for writ of certiorari (p. 24) that "no conspiracy in violation of the Sherman Act was shown."

Of course, the only question involved here is whether the verdict of the jury was sustained by evidence.

The undisputed evidence disclosed that a series of contracts between the two respondents required Merchants Company to route all freight shipments within its control over the lines of respondent Railroad Company, to accord preferential treatment to traffic moving over those lines and not to extend the use of its facilities to traffic of any other railroad. In return, the Railroad Company agreed to pay the Merchants Company certain sums, ostensibly for handling freight at its warehouses, and to furnish siding connections and facilities without expense to the Merchants Company. (Plaintiff's Exhibit 1, R. 18-93). In certain of the agreements Railroad Company bound itself not to enter into similar agreements with any other warehouse company.

These contracts were carried out by both parties for many years. Practically all freight destined to or coming from the warehouses of the Merchants Company was routed over the lines of the respondent Railroad Company (Defendant's Exhibit 6, R. 273, 443-449); the Railroad Company fully carried out its part of the agreement, did not enter into similar arrangements with any other competitive warehouse company and did not pay any allowance to any other competitive company (R. 60).

In order further to promote the purposes of the contracts the Railroad Company designated the warehouses of the Merchants Company as freight stations (R. 371-372) and actively solicited freight to be consigned thereto. (Plaintiff's Exhibit 3, R. 154.) It also in effect granted to Merchants Company unlimited storage on its tracks at Philadelphia of freight in cars exempt from demurrage (R. 169 279, 369), although demurrage was charged plaintiff and

other competing warehouses under similar conditions (R. 185). It requires no argument to show that if one warehouse company is obliged to unload all the cars consigned to it immediately, upon pain of paying demurrage charges, and the other is permitted to unload them when convenient, or, if it is more convenient to its customers, to allow goods to remain in the cars indefinitely without charge, this is of great benefit to the favored warehouse company and in effect gives it an unlimited extension of its storage facilities in the cars of the carrier.

The Merchants Company made full use of the favors and advantages granted it, by establishing unfair warehouse rates and practices which were intended to and did divert business from other warehouses and other carriers.

It would seem incontestable that these contracts, and arrangements, the express purpose of which was to divert traffic from other carriers to the lines of Pennsylvania Railroad Company and from other warehouses to that of Merchants Company were in restraint of trade or commerce among the several states and that the necessary effect thereof was to monopolize or at least tend to monopolize part of interstate trade or commerce.

As was said by this Court in the case of *Merchants Warehouse Company v. United States,* 283 U. S. 501, at page 505:

> ". . . Shippers using public warehouse facilities generally select the company offering the lowest aggregate charge for the distribution of their goods, and, by reason of the allowances made, the contract warehouses are able to quote lower prices than their competitors, thus securing business which would otherwise go to the latter. The primary motive for the payment of the allowances to the contract warehouses is to gain

traffic, and the allowances are compensation to appellants for their solicitation of freight movements over the lines of the carriers."

It was also proven that the Railroad Company owned a considerable block of the stock of Merchants Company (R. 140).

Respondents argue that they in fact achieved no monopoly. This is, of course, not of controlling importance. The Sherman Act condemns all combinations "such as have a direct, natural, and evident tendency to create monopoly —that is, monopoly (or the power to monopolize) may be expected to result therefrom": *United States v. Standard Oil Co. of New Jersey*, 47 F. (2d) 288, 298; regardless of their practical success: *United States v. E. C. Knight Co.*, 156 U. S. 1, 16; *United States v. Patten*, 226 U. S. 525, 543; *Anderson v. Shipowners Association of the Pacific Coast, et al.*, 272 U. S. 359, 363; *Montague & Co. v. Lowry*, 115 Fed. 27, 30 (affirmed 193 U. S. 38). If petitioner and other warehouse companies by the exercise of great diligence and sacrifice of profits succeeded in holding a measure of business, they did not thereby lose their right to recover damages for the injuries sustained.

If other railroad companies, by the use of methods similar to those which were adopted by the Pennsylvania Railroad Company, thereby secured or retained a portion of the transportation of package freight over their lines, this cannot affect the right of the petitioner to recover for the injury suffered.

The fact that respondents did not obtain a complete monopoly either of the transportation of package freight or of the warehouse business, cannot be ascribed to defects in their plans or to forbearance in their efforts to carry it out.

The power of common carriers to create unlawful monopolies invited comment by this court in *New York, N. H. & H. R. Co. v. Interstate Com. Com.*, 200 U. S. 361, 393; and in *Swift and Company v. United States*, 196 U. S. 375, 402, this Court said that "no more powerful instrument of monopoly could be used than an advantage in the cost of transportation". See also *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, and *United States v. Joint Traffic Assn.*, 171 U. S. 505.

It is clear that the concerted action of respondents did seriously affect and restrain the flow of interstate commerce, and did create at least a partial monopoly of the warehouse business, especially that relating to "heavy density" package freight (R. 196, 223).

It was argued in the court below and is asserted in respondents' brief in opposition to the petition for writ of certiorari (p. 24) that "A general warehouse business in Philadelphia is not interstate commerce and subject to the Sherman Act."

The question involved is not whether the general warehousing business is interstate commerce but whether petitioner was injured as a result of a contract, combination or conspiracy to restrain interstate commerce or to create a monopoly in such commerce or some portion thereof.

The evidence is clear that the object of the contract, combination or conspiracy was to increase the flow of package freight over the lines of respondent Railroad Company into the warehouses of respondent Merchants Company, and it is undisputed that the overwhelming volume of shipments of package freight into and from the warehouses was interstate in character (R. 175-183, 246, 265-273, Plaintiff's Exhibits 19 and 20).

The proposition that the Sherman Act condemns conspiracies to restrain or monopolize interstate commerce, even though they may be carried out by acts constituting

intrastate transactions, and that a plaintiff need not be himself engaged in interstate commerce to recover under the Sherman Act for damages caused by such a conspiracy is fully sustained by the following cases: *Ramsay Co. v. Associated B. P. of U. S. and C.*, 271 Fed. 140 (reversed on other grounds, 260 U. S. 501); *Sullivan v. Associated B. & D. of U. S.*, 272 Fed. 323 (reversed on other grounds, 6 F. (2d) 1000); *United States Copper Securities Co. v. Amalgamated Copper Co.*, 232 Fed. 574; *Binderup v. Pathe Exchange*, 263 U. S. 291; *Chattanooga F. & P. Works v. Atlanta*, 203 U. S. 390; *Hood Rubber Co. v. United States Rubber Co.*, 229 Fed. 583. See also *Local 167 v. United States*, 291 U. S. 293.

3. The Evidence Supports the Verdict of the Jury as to the Damage Suffered.

Respondents argued in the court below and assert on page 24 of their brief in opposition to the petition for writ of certiorari, that "the proofs failed to show any damage suffered by petitioner."

In view of the admitted and undisputed facts a consideration of this point seems scarcely necessary.

However, it may be pointed out that petitioner's claim for damages was confined to pecuniary losses on business actually transacted by it which it had been forced to do for nothing or at less than a normal and proper charge, in order to meet the unfair competition to which it was subjected as a result of the conspiracy.

As proof of the amount of damages sustained on business actually handled, petitioner offered the testimony of its president supported by an elaborate schedule which he had prepared consisting of five volumes of typewritten

sheets. His description of the schedule was in the following language (R. 197):

> "I prepared a statement of all the tonnage, carload tonnage, received by us during this period, and on that statement I have indicated the date of arrival of the car at our warehouse, the car initials and number, the point of origin, the name of the commodity, weight of consignment, the contract rate, or the rate at which we were forced to take this business at, and the normal rate that we would have obtained had it not been for the terminal allowance, and the difference in dollars and cents.. . ."

From the schedule he omitted any shipments as to which there was no sufficient data, and he also omitted all shipments passing through the warehouse on which petitioner did not meet the unfair competition and was able to make normal charges (R. 197).

By means of this schedule petitioner's president was able to testify as to the total amount which the petitioner did receive for handling shipments of the character described passing through the warehouse during the statutory period, and the amount it would have received had it not been for the unfair competition resulting from the conspiracy. The amount so ascertained and testified to by the petitioner's president was more than three times the amount of the verdict of the jury.

Respondents' criticism of this method of proving the amount of damages is based on their contention that petitioner's "so-called 'normal rate' was an arbitrary rate wholly unrelated to 'prevailing rates' and afforded no standard for measuring damages." Such a criticism is technical rather than substantial. The substance of the testimony of petitioner's president was a careful estimate

of the amount which it would have received for services rendered, carefully itemized, had it not been for the unfair competition.

However, in answer to the contention that no "normal rate" or "regular rate" was established, it should be pointed out that witness Sullivan included in the statement a copy of "Terminal Warehouse Company, handling package rate tables for bags, cartons, cases, crates and metal ingots", being a regular schedule of all its rates (R. 238).

He testified that these rates were "predicated upon the cost of service" and were the rates which petitioner had to get "in order to pay for the cost of the service" (R. 213). (See *Story Parchment Co. v. Paterson Co.*, 282 U. S. 555, 561.) He testified that petitioner always attempted to get these rates and cut them only to the extent necessitated by the competition established by respondent, Merchants Warehouse Company (R. 197, 214-217, 226). This schedule, as well as the entire compilation, was submitted to counsel for respondents for their examination and they had every opportunity to attack the figures contained in the compilation or in the rate table had they chosen so to do (R. 238).

Some days later, during the presentation of their defense, they called petitioner's president as their witness and questioned him in respect of the warehouse rates on only two commodities, flour and canned goods (R. 378-380). Their next witness, Mr. Justice, testified that he heard this testimony of petitioner's president and, expressing an opinion, testified that he never heard of any one getting such rates. His cross-examination disclosed a higher rate on canned goods published in a tariff of respondent Merchants Company (R. 380-384). Having had ample opportunity to reveal, by analysis and testimony of their experts, any infirmity attributable to petitioner's five-volume state-

ment, its tariff, and its warehouse rates published in the tariff, we submit that their failure to do so attests the substantial accuracy of the statement, tariff and rates, and of the estimate of petitioner's president, based thereon.

The weight to be given petitioner's estimate was, of course, for the jury. Of its admissibility, we submit, there can be no doubt: *William H. Rankin Co. v. Associated Bill Posters of U. S., etc.*, 42 F. (2d) 152 (C. C. A. 2d, certiorari denied, 282 U. S. 864.

See also *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555, 563, in which this Court said:

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise."

Respondents have also contended that petitioner is not entitled to recover any damages because it appears that improper arrangements similar to that of which complaint is here made were also in effect between the Reading Company and the Baltimore & Ohio Railroad Company and certain other favored warehouses. All of this is entirely immaterial. That warehouse rates and practices in Philadelphia were in fact established by the acts of respondents

is abundantly clear. They initiated the unlawful practices and the two other carriers later adopted somewhat similar but less injurious practices as a measure of self-protection to avoid diversion of their traffic to the initial combination. (R. 251-256, 288, 289, 393, 395-399).

Petitioner's president testified (R. 214):

> "The rate here in Philadelphia was fixed by the Merchants Warehouse Company. They were the ones that got those allowances and had those privileges, which enabled them to establish the rate and everybody else in Philadelphia had to meet that rate."

And, on cross-examination, answering the suggestion that the other favored warehouse companies had also cut rates he said (R. 226):

> "But they didn't make the rates. The Merchants Warehouse made the rates. In other words, they cut the largest amount, and everybody had to go to the same level."

It thus appears not only that the rates and practices of the Merchants Company inflicted the injury, but that the combination composed of the two respondents would have caused petitioner's injury and damage in the absence of any other combination. Respondents are, therefore, liable for the full amount of that damage. *Allison v. Hobbs*, 96 Me. 26, 51 Atl. 245; *Gulf C. and S. F. Ry. Co. v. Cities Service Co.*, 273 Fed. 946, 951; *Graves v. C. & S. Telegraph Association*, 132 Fed. 387; *Stone v. Dickinson*, 87 Mass. 29; *Vandiver & Co. v. Pollak*, 107 Ala. 547, 19 So. 180; *Corey v. Havener*, 182 Mass. 250, 65 N. E. 69; *Anderson v. Minn., St. P. & S. S. M. Ry. Co.*, 146 Minn. 430, 179 N. W. 45; *Kingston v. Chi. & N. W. Ry. Co.*, 191 Wis. 610, 211 N. W. 913.

It has been further argued that respondents could in no event be held liable for losses sustained by petitioner in handling freight which was not shipped over the Pennsylvania Railroad. Such a position is untenable. The wrong was a conspiracy to violate the Sherman Act. The injury occasioned by that wrong was the establishment of unfairly competitive rates which petitioner had to meet. The rates having been established, the petitioner necessarily had to meet them as to any traffic which presented itself, whether it came over the lines of the respondent railroad company or otherwise. It is an entirely immaterial circumstance that some of it, or even that the bulk of it, may have been brought to petitioner's warehouses by other carriers.

Petitioner's proof of damage was exceptionally clear and definite and fully sustains the comparatively small award made by the jury. There is no complaint of the *amount* of the verdict, which falls far short of the sum which would be compensatory for the injury sustained by petitioner and the actual damages to its business which the evidence shows.

4. Conclusion.

This case was very carefully tried and resulted in a verdict of a very moderate amount; the total amount of the judgment is less than the damages proven by the petitioner. There is no criticism of the Judge's charge to the jury. It is submitted that nothing which took place before the Interstate Commerce Commission operates to bar the present action as against either or both respondents.

The evidence fully supports the verdict of the jury in finding that a combination or conspiracy to violate the Sherman Act existed and fixing the amount of damages.

It is respectfully submitted that the judgment of the Circuit Court of Appeals for the Third Circuit should be reversed and the judgment of the District Court affirmed.

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IN THE

Supreme Court of the United States

No. 351. **October Term, 1935.**

TERMINAL WAREHOUSE COMPANY (Plaintiff-Appellee in the Court Below),
Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY and MERCHANTS WAREHOUSE COMPANY (Defendants-Appellants in the Court Below),
Respondents.

Brief for Respondents in Opposition to the Petition for Writ of Certiorari.

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INDEX.

	Page
I. CONCISE STATEMENT OF THE CASE	1
II. ARGUMENT	5
A. Damages denied by the Commission are not recoverable in a subsequent action under the Sherman Act	5
B. Petitioner has advanced no reason for allowing a writ of certiorari	10
(1) Question of Commission's jurisdiction to award reparation against a non-carrier	11
(2) The present action cannot now be treated as an action solely against Merchants	11
(3) The Commission's jurisdiction to award the reparation sought against Railroad	13
(4) The present action and the proceeding before the Commission are based on the same cause of action	16
C. Respondents' additional complete defenses to the present action	23

INDEX OF CASES CITED.

Page

B.

B. & O. R. R. Co. v. Brady, 288 U. S. 448 (1933) 7

G.

Gallagher v. Penna. R. R. Co., 160 I. C. C. 563 (1929) 2, 17

Glenn Coal Co. v. Dickinson Fuel Co., 69 Fed. (2d) 885 (1934) .....

H.

Hillsdale Coal & Coke Co. v. Penna. R. R. Co., 237 Fed. 272 (1916) 7

I.

Interstate Commerce Commission v. United States, 289 U. S. 385 (1933) 6, 13

J.

Jacoby v. P. R. R. Co., 200 Fed. 989 (1912) 14

Joynes v. Penna. R. R. Co., 17 I. C. C. 361 (1909) 14

K.

Keogh v. C. & N. W. Ry. Co., 260 U. S. 156 (1922) 21, 22, 23

L.

Louisville & Nashville R. R. Co. v. Ohio Valley Tie Co., 242 U. S. 288 (1916) 8, 9, 13, 19

M.

Markle Co. v. Lehigh Valley R. R. Co., 271 Fed. 989 (1921) 7

Merchants Warehouse Co. v. United States, 44 Fed. (2d) 379 (1930) 19

Merchants Warehouse Co. v. United States, 283 U. S. 501 (1931) 17, 18, 19

Miles Lumber Co. v. C. B. & Q. Ry. Co., et al., 89 I. C. C. 761 (1924) 14

INDEX OF CASES CITED—Continued.

Page

P.

Penna. R. R. Co. v. International Coal Co., 230 U. S. 184 (1913) 8, 13

Penna. R. R. Co. v. Clark Coal Co., 238 U. S. 456 (1915) 7

S.

Southwestern Milling Co. v. C. R. I. & P. Ry. Co., 161 I. C. C. 291 (1930) 13

Standard Oil Co. v. United States, 283 U. S. 235 (1931) 7

T.

Terminal Warehouse Co. v. Pennsylvania R. Co., 7 Fed. Supp. 484 (1934) 3, 4

CHRONOLOGICAL INDEX OF ACTS OF CONGRESS CITED.

Page

Interstate Commerce Act of February 4, 1887, sections 2, 3, 8, 9, 10 (4) (49 U. S. C. A. 2, 3, 8, 9, 10) 7, 8, 14, 15, 19, 20

Sherman Anti-Trust Act of July 2, 1890, sections 1, 2 and 7 (15 U. S. C. A. 1, 2 and 7) 5, 10, 20, 21, 22

Elkins Act of February 19, 1903 (49 U. S. C. A. 41-43) 19

Clayton Act of October 15, 1914, section 4 (15 U. S. C. A. 15) 20

IN THE

Supreme Court of the United States.

No. 351. October Term, 1935.

TERMINAL WAREHOUSE COMPANY (PLAINTIFF-APPELLEE IN THE COURT BELOW),

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY AND MERCHANTS WAREHOUSE COMPANY (DEFENDANTS-APPELLANTS IN THE COURT BELOW),

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

The reasons assigned by petitioner for granting a writ of certiorari rest upon an erroneous conception of the decision of the Third Circuit Court of Appeals and an unwarranted gloss of the facts. After giving a brief history of the case, respondents will first discuss the sole ground upon which the judgment was reversed and thus demonstrate that no reason exists for the allowance of an appeal. Respondents will then answer the new and unsound reasons advanced in support of the petition.

I. CONCISE STATEMENT OF THE CASE.

Petitioner complained to the Commission that it had been injured by Railroad's payment to Merchants of an allowance for the handling of inbound and outbound freight, which allowance petitioner claimed enabled Merchants to

grant customers forty-eight-hour handling service and thus cut normal warehouse charges with a resultant diminution of petitioner's normal business profits; and prayed for a "cease and desist" order and reparation (Defs. Ex. 12; R. 455-456, 494-497). After full hearings, the Commission granted the order and directed Railroad to stop the allowances and cancel its tariff provisions under which the facilities of Merchants were made a part of Railroad's station facilities (R. 476-485); but denied the claim of reparation in a Report, holding in part (R. 484-485):

> "*Complainants confine the basis of their claim for reparation to damages resulting from shrinkage or diminution of their normal business profits.* They urge that they be permitted to submit proof of actual pecuniary loss at a further hearing to be held subsequent to the decision herein, contending that it would be impracticable to make such proof prior to the date the unjust discrimination and undue prejudice is removed. We are not inclined to this view. *Complainants have been accorded ample opportunity to present facts supporting an award of reparation. Their case must stand or fall on the facts now of record. The evidence is far too vague and indefinite to warrant the conclusion that complainants have suffered actual pecuniary loss attributable directly to the alleged unlawful practices.* Damage must be shown with certainty to support an award of reparation under findings of unjust discrimination or undue prejudice. Penna. R. R. Co. v. International Coal Co., 230 U. S. 184, 206. Reparation is denied." (160 I. C. C. 563, 568-569.) (Italics supplied.)

Following the Commission's denial of reparation, petitioner brought the present action, alleging that respondents had combined and conspired to destroy Terminal's warehousing business in order to acquire a monopoly of Phila-

delphia's warehousing business for Merchants and the complementary transportation business for Railroad (R. 9-15). At trial, the claim of damages was limited to an alleged loss of profits arising from the shrinkage or diminution of Terminal's charges below its normal rates, which shrinkage or diminution petitioner attributed to Merchants' forty-eight-hour free handling service pursuant to the allowances paid by Railroad (R. 188-201, 234-238). Petitioner's proofs were practically the same as before the Commission and were founded upon the several contracts between Railroad and Merchants, under which the allowances were paid in consideration for the free handling of certain warehouse freight and Merchants' facilities became a part of Railroad's station facilities.

The trial judge and petitioner conceded that the damages claimed in the present action and awarded by the jury were the same damages that the Commission had denied (R. 603, 604, 606); and this was affirmed by the Circuit Court of Appeals (R. 662-663). Judge Dickinson stated in his opinions sur Motion for a New Trial (R. 603, 606):

> ". . . It may be noted that the damages sought to be recovered in the conspiracy action are the same damages which, under the ruling of the Commission, might have been awarded by it."
>
> . . . . . .
>
> "3. As we have said *the controlling question is whether the plaintiff having asked for and been given an award by the Interstate Commerce Commission can recover the same damages under the Sherman Act.* The fact that the award was negative makes no difference.
>
> "The experienced counsel for plaintiff, having the courage of his convictions, has frankly made two admis-

sions. *He admits that the plaintiff made claim before the Commission for reparation, which included the same damages which the jury awarded, and further admits that if the Commission had the jurisdictional power to award the damages allowed by the jury, the plaintiff cannot recover in the instant case.*" (7 Fed. Supp. 484, 487, 488.) (Italics supplied.)

Circuit Judge Thompson succinctly compared petitioner's evidence before the Commission and the District Court, stating (R. 662-663):

> "In the action before the Commission, the complainants produced documentary evidence that the subsidized warehouse companies cut or shrunk normal warehouse charges by affording free distribution of warehouse freight. They also produced testimony that the rebates, which took the form of allowances, enabled the subsidized warehouse companies to give free service; that the rebates were used to the detriment of the complainants; and that the combination fixed the market value of the warehouse service in Philadelphia. In the action before the District Court, Terminal produced testimony that Merchants made no charge for goods handled during the forty-eight hour free period and collected no demurrage for car detention, whereas Terminal had to pay for car detention as well as for construction and maintenance of side tracks to its warehouses; that Terminal had to charge its costs for handling in-bound and out-bound freight, and could not compete with Merchants' offer of free service because it received no railroad allowance; that, as a result, Terminal could not handle heavy density products and had to reduce its rates on light density products; and that reduced charges, made necessary by the alleged unfair competition, were less by $536,278.35 than the normal rate would have netted Terminal.

"We conclude that the testimony upon which Terminal relied to prove damages in the District Court was substantially identical with that upon which it relied to prove damages before the Commission." (Italics supplied.)

The trial judge held that the Commission lacked jurisdiction to award the damages recovered in the present action and therefore decided that the Commission's denial of those damages did not bar the present action (R. 605-611). On appeal, the Circuit Court of Appeals determined that the Commission had jurisdiction to award such damages and reversed upon the sole ground that the present action was barred by the prior proceedings before the Commission (R. 663-665).

II. ARGUMENT.

In concluding that the Commission had jurisdiction to award the damages claimed and that the Commission's denial thereof precluded the recovery of the same under the Sherman Act, the Circuit Court of Appeals but followed the law of this Court so that there is no special and important reason for granting a writ of certiorari. Moreover, the reasons assigned by petitioner are unsound and contrary to its position in the courts below. They will be discussed in order.

A. Damages denied by the Commission are not recoverable in a subsequent action under the Sherman Act.

This Court has repeatedly declared that the findings of the Commission as to reparation are judicial in nature and final; and that damages denied by the Commission are not recoverable in any other court or tribunal. Where, as here, a complainant elects to proceed before the Commis-

sion invoking not only its administrative jurisdiction (as shown by the "cease and desist" order) but also its judicial jurisdiction to give full damages by way of reparation, that complainant has had his day in court before a tribunal of his own selection and will not be permitted to seek elsewhere the damages denied by the Commission. The finality of the Commission's denial of damages and the consequent barring of subsequent actions for the same was applied by Mr. Justice Cardozo in *Interstate Commerce Commission v. United States,* 289 U. S. 385 (1933), which case is cited and followed by Circuit Judge Thompson (R. 663). The following language is from the opinion of this Court (pp. 388, 394):

> ". . . The respondent by its complaint to the Commission invoked this dual jurisdiction, the administrative jurisdiction to prescribe a rule for the future (Great Northern Railway Co. v. Merchants Elevator Co., 259 U. S. 285, 291; Baltimore & Ohio R. R. Co. v. Brady, 288 U. S. 448), and the judicial or quasi-judicial jurisdiction to give reparation for the past. Baltimore & Ohio R. R. Co. v. Brady, supra. *In dismissing such a complaint, the Commission speaks with finality. Its orders purely negative—negative in form and substance—are not subject to review by this court or any other.* Standard Oil Co. v. United States, 283 U. S. 235; Alton R. Co. v. United States, 287 U. S. 229; Procter & Gamble Co. v. United States, 225 U. S. 282; Baltimore & O. R. Co. v. Brady, supra. *Damages for discrimination denied by the Commission are not recoverable somewhere else.*
>
> . . . . . .
>
> *"The policy of the law has been to give finality to orders of the Commission negative in form and substance, and to keep them out of the courts.* Standard Oil Co. v. United States, supra; Alton R. Co. v. United

States, supra; Procter & Gamble Co. v. United States, supra; B. & O. R. Co. v. Brady, supra." (Italics supplied.)

Similar cases reaching a like result are *B. & O. R. R. Co. v. Brady,* 288 U. S. 448 (1933), at pp. 457, 458-459; *Standard Oil Co. v. United States,* 283 U. S. 235 (1931) at pp. 240-241; *Penna. R. R. Co. v. Clark Coal Co.,* 238 U. S. 456 (1915); *Markle Co. v. Lehigh Valley R. R.,* 271 Fed. 989 (1921) at p. 991; and *Hillsdale Coal & Coke Co. v. Penna. R. R.,* 237 Fed. 272 (1916) at p. 274.

Petitioner as well as the courts below admitted that the present action was barred under the above decisions, provided only that the Commission had jurisdiction to grant the damages it denied; and the controlling issue thus became whether or not the Commission under Sections 8 and 9 of the Interstate Commerce Act (49 U. S. C. A. 8-9) had authority to grant reparation for an alleged loss of profits (R. 606, 663). Compliant to the numerous decisions of this Court, Circuit Judge Thompson determined that the Commission was vested with that authority and accordingly reversed the judgment. In passing, it should be observed that before the Commission petitioner argued that there was jurisdiction to allow damages for an alleged shrinkage or diminution of normal profits on actual business transactions (R. 497); but took exactly the contrary position in the present action when the trial judge's first opinion of May 4, 1934, made it necessary (R. 598-604).

This Court has always construed Section 8 to authorize the recovery of consequential damages for injury to one's business including shrinkage or diminution or prevention of normal business profits. A leading case in point, which petitioner relied upon in the earlier proceedings and which the Commission adopted in its Report (R.

485, 497), is that of *Penna. R. R. Co. v. International Coal Co.*, 230 U. S. 184 (1913), in which Justice Lamar defined the broad scope of the statutory term "full amount of damages" of Section 8 as follows (pp. 203-204):

> ". . . There was no proof of injury—*no proof of decrease in business, loss of profits, expense incurred or damage of any sort suffered*—the plaintiff claiming that, as matter of law, the damages should be assessed to it on the basis of giving to it the same rate, on all its tonnage, that had been allowed on any contract coal shipped, on the same dates, whether such tonnage was great or small.
>
> . . . . . .
>
> "If plaintiff and one of the favored companies had both shipped coal to the same market on the same day, the rebate on contract coal may have given an advantage which may have prevented the plaintiff from selling, may have directly caused it expense, or may have diminished or totally destroyed its profits. *The plaintiff, under the present statute, in any such case being then entitled to recover the full damages sustained;—*" (Italics supplied.)

In *Louisville & Nashville R. R. Co. v. Ohio Valley Tie Co.*, 242 U. S. 288 (1916), Justice Holmes applied the same broad definition to the phrase "full amount of damages" and further held that an award of damages under Section 8 was conclusively presumed to include every item of damage attributable to the unlawful practices. He said (pp. 290-291):

> "The Court of Appeals decided that the Act to Regulate Commerce committed to the Interstate Commerce Commission only the granting of special relief against the making of an overcharge and that the satisfaction of the Commission's award still left open

an action in the state courts to recover what are termed general damages—such as are supposed to have been recovered in this case. In this we are of opinion that the court was wrong.

"By section 8 a common carrier violating the commands of the act is made liable to the person injured thereby 'for the full amount of damages sustained in consequence' of the violation. . . . The decisions say that whatever the damages were they could be recovered; Pennsylvania R. R. Co. v. International Coal Mining Co., 230 U. S. 184, 202, 203; Meeker v. Lehigh Valley R. R. Co., 236 U. S. 412, 429; and that the statute determines the extent of damages. Pennsylvania R. R. Co. v. Clark Brothers Coal Mining Co., 238 U. S. 456, 472. *We are of opinion that all damages that properly can be attributed to an overcharge, whether it be the keeping of the plaintiff out of its money, dwelt upon by the trial court, or the damage to its business following as a remoter result of the same cause, must be taken to have been considered in the award of the Commission and compensated when that award was paid.*

"If at a new trial the plaintiff can prove that the defendant unjustifiably refused cars or caused it other damage not attributable to the overcharge of freight, our decision does not prevent a recovery; but it is evident that the present judgment embraces elements that cannot be allowed." (Italics supplied.)

The many decisions in accord are cited in the opinion of the Circuit Court of Appeals (R. 663); and in the interests of brevity will not be repeated here.

Petitioner attempts to distinguish the *Louisville & Nashville R. R. Co.* case, *supra,* by quoting at length from the decision of the District Judge which was reversed on appeal. Our quotation from this Court's opinion un-

equivocally sets forth that all damages resulting from the alleged excessive charge were within the jurisdiction of the Commission and that subsequent resort to the courts as to such matters was not permitted. In the present action it was within the Commission's jurisdiction to award damages resulting not only from the allowances paid by Railroad to Merchants but also from the contractual arrangement whereby Merchants' warehousing facilities were made a part of Railroad's station facilities to the alleged prejudice of petitioner. Because petitioner failed to produce adequate proof of any such damages, the Commission refused an award.

It is submitted that in reversing the judgment of the trial court, the Circuit Court of Appeals properly followed the law of this Court to the effect that the Commission had jurisdiction to grant full reparation and that a negative order of the Commission barred the recovery of identical damages in a subsequent action under the Sherman Act. It therefore appears that the decision of that appellate court precludes the existence of any special and important reason for a review of the present case on a writ of certiorari.

B. Petitioner has advanced no reason for allowing a writ of certiorari.

Petitioner asks this Court to allow a writ of certiorari upon a number of allegations which have no foundation either in fact or law. The "Questions Presented" and the "Reasons for Granting the Writ", appearing on pages 6 and 7 of the Petition do not set forth any question of law arising in this case. They are, in fact, hypothetical questions bearing no relation to the record.

(1) Question of Commission's jurisdiction to award reparation against a non-carrier.

Petitioner consistently tries to make it appear that the decision of the Circuit Court of Appeals is based upon the supposed jurisdiction of the Commission to award joint damages against Railroad and Merchants. To substantiate this misinterpretation, a sentence is lifted out of the opinion of Circuit Judge Thompson and surrounded by a context wholly different from anything said in the opinion. This is so transparently disingenuous as to require no further comment.

A reading of the clear and succinct opinion is sufficient to refute the contention. It is squarely based upon the finding that petitioner has already had its day in court as against Railroad, and is now barred of an action to recover for the same injury in which Railroad is a joint defendant. Respondents at no time ever suggested that the Commission could have awarded reparation against Merchants. This can be seen by reference to respondents' Points for Charge in the trial of the case (R. 548-554), and to the Assignments of Error (R. 636-650).

It follows that the first "Question Presented" and the first "Reason for Granting the Writ" fail to state any question which need be considered by this Court.

(2) The present action cannot now be treated as an action solely against Merchants.

At pages 14 and 20 of the supporting brief, there are clear intimations that petitioner recognizes the force of the decision of the Circuit Court of Appeals, at least insofar as Railroad is concerned. Petitioner, however, argues that even though its claim for damages be barred as against

Railroad, yet it may still proceed against Merchants in the present action because it did not ask the Commission for reparation from Merchants and because the Commission could not have made any such award. Along the same line of reasoning, petitioner, at page 20 of its brief, suggests a supposititious case in which A's failure to recover damages for personal injury against B does not bar A of a subsequent suit against C.

By this argument petitioner hopes to overcome its voluntary admission in the courts below that if the Commission had jurisdiction to award damages against Railroad, the present action was barred (R. 606). It ignores the fact, of which petitioner can scarcely be ignorant, that the present suit is brought, not against a third party, but against Railroad and Merchants jointly. From the inception of the present action, they have been indissolubly joined together. The Statement of Claim avers that they and they alone combined and conspired against petitioner; and the proofs are directed entirely against the acts of both (R. 8-15, 137-250). The verdict and judgment are joint (R. 555, 629).

Heretofore, petitioner has never sought to separate them or their liability and has bottomed its cause of action upon the ground that the evidence proved that petitioner's injury had its source in the contractual arrangements between Railroad and Merchants and that there was direct causal connection between the allowances and the alleged damages. As petitioner once stated before the Commission "the record shows these powerful combinations of carrier and subsidized warehouse ally fixing the market value of warehouse service for the warehouse industry of Philadelphia" (R. 494). It is too late now to assert that the sole cause of injury was the intervening act of Merchants.

Under all the authorities cited herein as well as in the opinion of the Circuit Court of Appeals, the present action must fail, if recovery is barred against either joint respondent. It follows that the second "Question Presented" has no application to this case.

(3) The Commission's jurisdiction to award the reparation sought against Railroad.

Notwithstanding the unanimous decision of the Circuit Court of Appeals, and the decisions of this Court upon which it is based, petitioner contends that the Commission lacked jurisdiction to award reparation from Railroad for any loss sustained by petitioner in its business by reason of the payments made by Railroad to Merchants and found by the Commission to be illegal rebates. If petitioner's contention is sound, the Commission would be without jurisdiction to award reparation in any case of unlawful rebating or discrimination by a carrier, since in such cases the only recovery possible is the amount of loss occasioned by the favored shipper's taking advantage of his position to cut below market prices. The question need not be discussed, however, since this Court has repeatedly held that the Commission has power to award such reparation. *Penna. R. R. Co. v. International Coal Company,* 230 U. S. 184 (1913). *Louisville & Nashville R. R. Co. v. Ohio Valley Tie Co.,* 242 U. S. 288 (1916). *Interstate Commerce Commission v. United States,* 289 U. S. 385 (1933).

In support of its contention with respect to the limited jurisdiction of the Commission, and in the face of the above authorities, petitioner has cited the following cases:

Southwestern Milling Company v. C. R. I. & P. Ry. Co., et al., 161 I. C. C. 291 (1930), in which reparation was asked

because of discrimination in rates, but denied by the Commission because there was no proof of injury to the complainant. The Commission held that it had jurisdiction to award the reparation asked if damages were proved, but that the complainant had failed to show that his favored competitors had taken advantage of their position to cut below the market price. Far from sustaining petitioner's contention, this decision directly opposes it.

E. C. Miles Lumber Co. v. C. B. & Q. R. R. Co., et al., 89 I. C. C. 761 (1924), in which reparation was granted for the refusal of the Railroad to accept freight at one of its stations. This case has no bearing on the question whatever.

Joynes v. P. R. R. Co., 17 I. C. C. 361 (1909), in which the Commission held that it had no jurisdiction to award damages in cases of rebates or discrimination by a carrier, and that jurisdiction to award reparation was limited to cases of unreasonable rates and overcharge by the carrier, in which case the excess charges could be ordered repaid. This decision was flatly overruled in *Jacoby v. P. R. R. Co.*, 200 Fed. 989 (1912), and in the above cited decisions of this Court. This case, therefore, lends no support to petitioner's contention.

To bolster its contention that the Commission lacked jurisdiction to award the reparation sought from Railroad, petitioner now alleges (page 4 of the Petition) that in the proceeding before the Commission the Railroad itself contended "that said damages could not be the subject of a reparation order under sections 8 and 9 of the Interstate Commerce Act". This allegation is utterly untrue, and is unsupported by anything in the record. Sections 8 and 9 of the Interstate Commerce Act were not referred to in the

complaint before the Commission (R. 451-456), although reparation was asked, nor was any issue made as to the application of these sections, nor reference made to them in the Answer of the Railroad (R. 468-469). The only issue in the proceeding was as to whether sections 2 and 3 of that Act had been violated by the arrangement between Railroad and Merchants; and, if so, whether the evidence disclosed, with sufficient definiteness to justify an award of reparation, that damage had resulted to the complainants from such violations. Railroad contended that there was no violation, but at no time contested the application of sections 8 and 9, or the Commission's jurisdiction to award reparation in case a violation of sections 2 and 3 were found (R. 486-511).

The following excerpts from the Petition for a Rehearing amply show that petitioner fully and competently argued the existence of the jurisdiction of the Commission to award the reparation sought—a matter in no way controverted by Railroad:

> (R. 494) "Uncontradicted documentary evidence shows that the subsidized warehouse companies cut, or shrunk, normal warehouse charges by affording free distribution of warehouse freight. Exhibits 6, 11, 42 to 51 inclusive. And the testimony is that the allowances, the rebates, enabled them to afford that free service. Rec. 635, 704. The evidence follows the rebates through the trade channels of the receivers of the rebates and shows actual use of the rebates by those receivers to the injury of the complainants, an exceptionally complete showing. The record shows these powerful combinations of carrier and subsidized warehouse ally fixing the market value of warehouse service for the warehouse industry of Philadelphia."
>
> (R. 497) "The shrinkage or diminution of normal business profits, as claimed by the complainants, is

based on actual and not theoretical business transactions, that is, it is based on actual business transactions which the complainants handled under the subnormal or 'cut' warehouse charges imposed by their subsidized competitors. Such curtailment or diminution of normal business profits is a foundation for reparation. Penna. R. R. Co. v. International Coal Company, 230 U. S. 184, 206; Cornell v. L. V. R. R., 57 I. C. C. 157, 163; Foster Lumber Co. v. V. & S. R. R. Co., 112 I. C. C. 651, 654; Puget Sound & Cascade Ry. Co. v. Director General, 91 I. C. C. 467, 470, 471. Damages also may be recovered for unlawful prevention of normal business gains. W. U. Tel. Co. v. Hall, 124 U. S. 444, 455."

The Commission refused reparation because petitioner had failed to produce sufficient evidence to warrant such an award. Petitioner correctly points out at the top of page 15 of its Brief that the Commission thus held that the *fact* of damage had not been proved. It is curious, therefore, that in the same paragraph, and elsewhere in the Petition and Brief, petitioner refers to this portion of the Commission's report as a finding that "the injuries" sustained by petitioner were not "attributable directly to the alleged unlawful practices". Petitioner thus endeavors to twist out of the words of the Commission a finding that injuries had been proved, but that they were not attributable to the Railroad. There is, of course, no warrant for such an interpretation. The finding was, on the contrary, that there was not sufficient proof of any injuries to warrant a recovery.

(4) The present action and the proceeding before the Commission are based on the same cause of action.

In the "Summary Statement of the Matter Involved", pages 2 to 5 of the Petition, and also 19 of petitioner's

Argument, it is alleged that the present suit under the Sherman Act differs substantially from the proceeding before the Commission under the Interstate Commerce Act, in that certain additional matters, namely, the maintenance of side-tracks by Railroad, freedom from demurrage charges, and the solicitation of business by Railroad for Merchants are here alleged as steps in the alleged conspiracy, but were not presented for the consideration of the Commission; and that the two suits are brought under different statutes. These contentions will be considered in turn.

The decision of the Commission (R. 476-485) shows clearly that, not only were the payments condemned, but that the Commission gave consideration also to the general relation between Railroad and Merchants and ordered Railroad to cancel its tariff provisions which made the facilities of Merchants a part of the station facilities of Railroad. Thus the Commission said (R. 485):

> "Defendants will therefore be required to cease and desist from publishing or making such discriminatory and preferential allowances. The Pennsylvania and the Baltimore & Ohio will also be required to cancel their tariff provisions which make the facilities of the contract warehouses a part of the respective station facilities of these defendants at Philadelphia." (160 I. C. C. 563, 569.)

The same fact also appears in the opinion of this Court which, describing the order of the Interstate Commerce Commission, said (283 U. S. 501 at pages 503-504):

> "The order required the Reading Company and the Pennsylvania and Baltimore & Ohio railroads, interstate rail carriers, to cancel such provisions in their tariffs as purported to make the warehouses of ap-

> pellants in Philadelphia a part of the station facilities of the carriers, and directed that they cease and desist from making allowances to appellants in connection with the loading and unloading of package freight at the latter's warehouses."

Following a full discussion of the status of the warehouses as station facilities (Pages 504-507), this Court reaches the conclusion:

> "We think, as the court below held, that the Commission's finding that appellants' warehouses are not in fact public freight stations, is supported by the evidence."

The suggestion in the Petition that other new matters are involved in this case (page 19), such as freedom from demurrage, free use of side-tracks, assistance in solicitation of business, is beside the mark since all these were incidents of the status which Merchants had under its contracts as the operator of stations of Railroad. In other words, demurrage could not be assessed on a car awaiting unloading by the Railroad's own agents, since demurrage is the penalty imposed upon the consignor or consignee for failure to unload within a reasonable time. Furthermore, Railroad would naturally provide and maintain the tracks at its own stations and would solicit business for movement to and from such points as against movement to or from competitive points.

In the proceedings before the Commission, as in the present action, the contracts between Railroad and Merchants constituted the basis of the attack, and the incidental features referred to above as new material interjected in this case, were, in no proper sense, either new material or matters of consequence. They were all inci-

dental to the underlying conception of the entire arrangement as embodied in the contracts, viz: that Merchants' warehouses constituted stations of Railroad, a relation which the Commission ordered discontinued, as indicated in the sentence above quoted.

Since the statement that no such matters were involved in the proceeding before the Commission finds no support in the present record, it is permissible for respondents to challenge the statement by a reference to the same contracts introduced in this case (R. 18-92, 411-415) which appear at pages 455 to 526 of the transcript of record in the *Merchants Warehouse Case,* 283 U. S. 501 (1931), the contents of which is summarized in *Merchants Warehouse Company v. United States,* 44 Fed. (2d) 379 (1930) at pages 381 and 386, and in 283 U. S. 501 (1931), at pages 504 and 509.

Moreover, even if these matters had not been before the Commission, petitioner would be foreclosed because, as held in *L. & N. R. R. v. Ohio Valley Tie Co.,* 242 U. S. 288, 291 (1916), they might have been made the basis of recovery under the challenge of the arrangement between Railroad and Merchants as a violation of Sections 2 and 3 of the Interstate Commerce Act (49 U. S. C. A. 2, 3) and of the Elkins Act (49 U. S. C. A. 41-43).

Furthermore, petitioner sought in this case to recover on account of the alleged advantage to Merchants in the securing of competitive business as a result of the allowances paid it, which was the basis of the principal part of the claim before the Commission. No effort was made to prove the portion of the damages due to what are suggested as the new matters here presented, but which were not new but implicit in the attack made on the Merchants' warehouses as the station facilities of the Railroad.

Petitioner's other contention, that an adverse decision upon a claim of reparation before the Commission in a proceeding under the Interstate Commerce Act, cannot bar a subsequent suit to recover treble damages under the Sherman Act, for the same alleged injury, must fall of its own weight. The argument proves too much. Under section 4 of the Clayton Act (15 U. S. C. A. 15) and under section 8 of the Interstate Commerce Act (49 U. S. C. A. 8) damages may be recovered by anyone who has been injured by reason of violation of the Sherman Act and Interstate Commerce Act respectively. No right of action is given unless there has been an injury—so that the injury is itself a part of the cause of action in each case. Where, as in the present case, the alleged injury is the same, it would follow from petitioner's argument that where both statutes have been violated the injured party could first recover full damages under the Interstate Commerce Act and then recover treble damages under the Sherman Act for the same injury. Such a duplication of right cannot be supposed to have been intended by Congress.

The result would be no different where damages have been denied in the first instance by the Commission. The aggrieved party having had his day in court is not entitled to bring suit for the same alleged injury under a different statute. As was said by Judge Thompson in writing the opinion of the Circuit Court of Appeals (R. 664):

> "Several statutory remedies were available to Terminal. It could have petitioned the Interstate Commerce Commission for an order directing the offending common carrier to cease and desist from the unlawful practices and for an award of damages; or it could have sued in the appropriate District Court for an award of damages or treble damages. It did not have the right,

however, to pursue each of the above remedies successively until such time as it found a tribunal which would award the damages sought. As we have already stated, Terminal did in fact petition the Interstate Commerce Commission for a cease and desist order, which was granted, and for an award of damages, which was denied. Terminal thereby elected its remedy, and is barred from subsequent action for the same damages."

In so holding, the Circuit Court of Appeals followed the decision of this Court in the case of *Keogh v. C. & N. W. Ry. Co.*, 260 U. S. 156 (1922), in which suit was brought under section 7 of the Sherman Act for damages resulting from an unlawful conspiracy between several railroads to establish high rates, whereby plaintiff alleged he had been injured. The Commission had previously found that the rates were reasonable, but the plaintiff contended that the rates were higher than they would have been had there not been a conspiracy. Writing the opinion of the Supreme Court, Mr. Justice Brandeis said (260 U. S. at 162):

". . . Under section 8 of the latter (Interstate Commerce) act the exaction of any illegal rate makes the carrier liable to the 'person injured thereby for the full amount of damages sustained in consequence of any such violation' together with a reasonable attorney's fee. Sections 9 and 16 provide for the recovery of such damages either by complaint before the Commission or by an action in a federal court. *If the conspiracy here complained of had resulted in rates which the Commission found to be illegal because unreasonably high or discriminatory, the full amount of the damages sustained, whatever their nature, would have been recoverable in such proceedings.* Louisville & Nashville R. R. Co. v. Ohio Valley Tie Co., 242 U. S. 288. *Can it be that Congress intended to provide the shipper, from whom illegal rates have been exacted, with an additional rem-*

edy under the Anti-Trust Act? See Meeker v. Lehigh Valley R. R. Co., 162 Fed. 354. And if no remedy under the Anti-Trust Law is given where the injury results from the fixing of rates which are illegal, because too high or discriminatory, may it be assumed that Congress intended to give such a remedy where, as here, the rates complained of have been found by the Commission to be legal and while in force had to be collected by the carrier?" (Italics supplied.)

The same doctrine was applied in *Glenn Coal Co. v. Dickinson Fuel Co., et al.*, 72 Fed. (2d) 885 (1934) (C. C. A. 4). There suit was brought under the Sherman Act for treble damages for an unlawful registration of a Trade Mark (alleged to be a step in a conspiracy in violation of the Sherman Act). The opinion was written by District Judge Chesnut, who said, citing the *Keogh case* as authority (72 Fed. (2d) at 888-889):

". . . We think it quite unreasonable to conclude that it was the intention of Congress in providing for three-fold damages in a civil suit for violation of the Anti-Trust Act to have intended to thereby give to a plaintiff in a case of this kind three-fold damages in addition to those given by the trade mark law, merely on the allegation that the registration was in furtherance of a conspiracy to violate the Anti-Trust Act. See Keogh v. C. & N. W. Rwy. Co., 260 U. S. 156, 162, 43 S. Ct. 47, 67 L. Ed. 183. Such a construction would necessarily extend the scope of the latter Act to cases beyond its fair import and make it possible to convert almost any and every trade mark controversy into a civil suit under the Sherman Act."

In the present case, petitioner has made its election to recover damages under the Interstate Commerce Act. If it had any cause of action whatever under the Sherman Act,

it was too late to bring such an action after an application for reparation under the Interstate Commerce Act had been made to the Commission, and action thereon taken by it. Petitioner endeavors to escape this result by arguing that the Commission had no jurisdiction to award reparation against Merchants, a non-carrier. Petitioner relies on the unfounded contention that the election to recover under one of the statutes is not an election at all, if damages are asked against only one of several possible parties who might be liable. However, such a side-stepping is clearly impossible, under the above authorities. Having elected to pursue its remedy under the Interstate Commerce Act, petitioner was restricted to recovery under that Act.

It is thus clear that there is no conflict between the decision of the Circuit Court of Appeals in the present case and the decisions of this Court and of other Circuit Courts of Appeal. The third "Question Presented" and the second "Reason for Granting the Writ" should be answered in the negative, and a writ of certiorari denied.

C. Respondents' additional complete defenses to the present action.

The judgment was reversed upon the sole ground that the prior proceedings before the Commission barred the present action. This rendered unnecessary a consideration of the other complete defenses raised by respondents. They were

(1) the Sherman Act does not provide an additional remedy for an alleged injury under the Interstate Commerce Act; (see Keogh v. C. & N. W. Ry. Co., 260 U. S. 156 (1922));

(2) A general warehouse business in Philadelphia is not interstate commerce and subject to the Sherman Act;

(3) no conspiracy in violation of the Sherman Act was shown; and

(4) the proofs failed to show any damage suffered by petitioner.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 351. **October Term, 1935.**

TERMINAL WAREHOUSE COMPANY (Plaintiff-Appellee in the Court Below),

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY and MERCHANTS WAREHOUSE COMPANY (Defendants-Appellants in the Court Below),

Respondents.

BRIEF FOR RESPONDENTS.

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INDEX.

	Page
I. CONCISE STATEMENT OF THE CASE	1
II. ARGUMENT	12
A. THE PRESENT ACTION IS BARRED BY THE PRIOR PROCEEDING BEFORE THE INTERSTATE COMMERCE COMMISSION	15
1. The Commission denied the identical damages claimed in the present action and awarded by the jury	16
2. The Commission had jurisdiction to award damages by way of reparation for actual lost profits	21
3. Having elected to claim damages by reparation from the Commission, petitioner may not recover identical damages under the Sherman Act	27
4. Sundry new matters advanced by petitioner in this Court as reasons why the present action is not barred by the prior Interstate Commerce proceeding	34
(a) *The instant judgment may not be reinstated against Merchants alone*	36
(b) *The Commission denied reparation because the evidence was inadequate*	44
B. RESPONDENTS' OTHER ASSIGNMENTS OF ERROR, WHICH WERE NOT CONSIDERED BY THE CIRCUIT COURT OF APPEALS BUT ARE BEFORE THIS COURT, RAISE COMPLETE DEFENSES TO THIS SUIT	49

Page

1. **The cause of action averred by petitioner in this case is under the Interstate Commerce Act and not under the Sherman Act** 50
2. **Merchants' general warehousing business in Philadelphia is not interstate commerce** 57
   (a) *General warehousing business is local, not interstate* 58
   (b) *General warehousing business is not commerce* 66
   (c) *Local warehousing business not being interstate commerce, the Sherman Act has no application to it* 69
3. **Respondents have in no way violated the Sherman Act** 73
   (a) *There was no combination or conspiracy between respondents within the Sherman Act* 73
   (b) *Respondents had no monopoly of either the warehousing business or the complementary transportation services* 79
   (c) *No restraint of the warehousing business and complementary transportation services was proved* 85
4. **Petitioner failed to show it had suffered any damage** 88
   (a) *Petitioner's so-called "normal rate" was an arbitrary rate wholly unrelated to "prevailing rates" and afforded no standard for measuring damages* 88

Page

(b) *Miscellaneous items in petitioner's alleged damages for which respondents were not responsible* 97

5. The trial judge lacked authority to treble the jury's verdict 103

C. CONCLUSION 109

INDEX OF CASES CITED.

A.

	Page
Albright v. M'Tighe, 49 Fed. 817 (1892)	41
Alexander Milburn Co. v. Union Carbide & Carbon Corp., 15 Fed. (2d) 678 (1926)	86
(Certiorari denied) 273 U. S. 757 (1927)	86
American Can Co. v. Ladoga Canning Co., 44 Fed. (2d) 763 (1930)	106
Appalachian Coals, Inc. v. United States, 288 U. S. 344 (1933)	88
Atlantic Coast Line Railroad Co. v. Standard Oil Co. of Kentucky, 275 U. S. 257 (1927)	62

B.

B. & O. R. R. Co. v. Brady, 288 U. S. 448 (1933)	30
B. & O. R. R. Co. v. United States, 215 U. S. 481 (1910)	53
Ballantine v. Cummings, 220 Pa. 621 (1908)	79
Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U. S. 518 (1928)	78
Blumenstock Bros. Adv. Agency v. Curtis Publishing Co., 252 U. S. 436 (1920)	67
Bothwell v. Buckbee Mears Co., 275 U. S. 274 (1927)	67
Brown v. Houston, 114 U. S. 622 (1885)	62

C.

Camp v. Gress, 250 U. S. 308 (1919)	41
Central Coke & Coal Co. v. Hartman, 111 Fed. 96 (1901) (C. C. A. 8)	96, 97

Page

Chattanooga Foundry & Pipe Works v. Atlanta, 203 U. S. 390 (1906) 106
Chicago B. & Q. R. Co. v. Harrington, 241 U. S. 177 (1916) 61
Clark v. Pennsylvania R. R., 241 Pa. 515 (1913), 238 U. S. 456 (1915) 106, 107
Coe v. Errol, 116 U. S. 517 (1886) 62
Continental Candy Corp. v. California & Hawaiian Sugar Ref. Co., 270 Fed. 302 (1920) 86
Coronado Coal Co. v. United Mine Workers of America, 268 U. S. 295 (1925) 106
Crescent Cotton Oil Co. v. Mississippi, 257 U. S. 129 (1921) 67

D.

D. L. & W. R. Co. v. Morristown, 276 U. S. 182 (1928) 78
D. L. & W. R. Co. v. Yurkonis, 238 U. S. 439 (1915) .. 67
Donovan v. Pennsylvania Co., 199 U. S. 279 (1905) ... 78
Duignan v. United States, et al., 274 U. S. 195 (1927). 43

E.

Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359 (1927) 106
Edward Hines Trustees v. Martin, 268 U. S. 458 (1925) 44

F.

Federal Baseball Club v. National League, 259 U. S. 200 (1922) 68
Federal Compress & Warehouse Company v. McLean, 291 U. S. 17 (1934) 62, 63

G.

Page

Gallagher v. Pennsylvania R. R. Co., 160 I. C. C. 563 (1929) 2, 19, 44, 59, 76

Geraghty v. Lehigh Valley R. Co., 70 Fed. (2d) 300 (1934) (C. C. A. 2) 61

Gibbons v. Ogden, 9 Wheaton 1 (1824) 66

Glenn Coal Co. v. Dickinson Fuel Co., et al., 72 Fed. (2d) 885 (1934) 33, 56, 85

H.

Hammer v. Dagenhart, 247 U. S. 251 (1918) 67

Hillsdale Coal & Coke Co. v. P. R. R., 23 I. C. C. 186 (1912), 237 Fed. 272 (1916) 25, 30

Hooper v. California, 155 U. S. 648 (1895) 67

Hopkins v. United States, 171 U. S. 578 (1898) 59, 60, 68

Hulings v. Darlington, 57 Pa. Super. Ct. 535 (1914) 79

I.

Interstate Commerce Commission v. Illinois Central R. R. Co., 215 U. S. 452 (1910) 53

Interstate Commerce Commission v. United States, 289 U. S. 385 (1933) 23, 28

J.

James-Dickinson Co. v. Harry, 2[illegible] U. S. 119 (1927) .. 41

K.

Keogh v. C. & N. W. Ry. Co., 260 U. S. 156 (1922) 25, 32, 33, 51, 53

Keystone Elevator & Warehouse Co. v. Director General and Pennsylvania Railroad Co., 73 I. C. C. 273 (1922) 76

Page

Keystone Warehouse Company v. Pennsylvania Railroad Co. and Director General, 53 I. C. C. 335 (1919) 76, 78

Kidd v. Pearson, 128 U. S. 1 (1888) 67

L.

Lehigh Valley R. Co. v. Barlow, 244 U. S. 183 (1917). 61

Louisville & Nashville R. R. Co. v. Ohio Valley Tie Co., 242 U. S. 288 (1916) 22, 57

M.

McCluskey v. Marysville & Northern Rwy. Co., 243 U. S. 36 (1917) 62

McCormick Warehouse Co. v. Pennsylvania Railroad, 95 I. C. C. 301 (1925), 148 I. C. C. 299 (1928)... 76, 77

Merchants Warehouse Company v. United States, et al., 44 Fed. (2d) 379 (1930)..... 2, 17, 21, 59, 74, 77

Merchants Warehouse Company v. United States, et al., 283 U. S. 501 (1931)..... 3, 17, 18, 19, 20, 25, 50, 53, 59, 65, 74, 77

Minnesota v. Blasius, 290 U. S. 1 (1933)..... 62

Montague v. Lowry, 193 U. S. 38 (1904)..... 105, 108

Moore v. New York Cotton Exchange, 270 U. S. 593 (1926) 88

Morrisdale Coal Co. v. Penna. R. R., 230 U. S. 304 (1912) 54

Morrow v. Morrow, 61 Pa. Super. Ct. 208 (1915).... 79

N.

Nathan v. Louisiana, 8 Howard 73 (1850)..... 68

National Association of Window Glass Mfgrs. v. United States, 263 U. S. 403 (1923)..... 88

INDEX OF CASES CITED—Continued.

Page

N. Y. C. R. R. v. Gen. Elec. Co., 83 N. Y. Misc. 529 (1914) 29

N. Y. Life Insurance Co. v. Deer Lodge County, 231 U. S. 495 (1913) 67

P.

Paul v. Virginia, 8 Wallace 168 (1869)..... 67

Pennsylvania R. R. v. Clark Coal Co., 238 U. S. 456 (1915) 31

Pennsylvania R. R. v. International Coal Co., 230 U. S. 184 (1913) 14, 21, 22, 55

Pennsylvania R. R. v. Jacoby & Co., 242 U. S. 89 (1916) 25

Pennsylvania R. R. v. Keystone El. & Warehouse Co., 237 U. S. 432 (1915) 76

Pennsylvania R. R. v. Minds, 250 U. S. 368 (1919)... 25

Pennsylvania R. R. v. Weber, 257 U. S. 85 (1921).... 26

R.

Robinson v. B. & O. R. R. Co., 222 U. S. 506 (1912).. 53

S.

Schauffele v. Director General, 276 Fed. 115 (1921) (C. C. A. 3) 62

Schechter Poultry Corporation v. United States, 295 U. S. 495 (1935) 60

Stafford v. Wallace, 258 U. S. 495 (1922).....

Standard Oil Co. v. United States, 221 U. S. 1 (1911). 85

Standard Oil Co. v. United States, 283 U. S 163 (1931) 83, 85

Standard Oil Co. v. United States, 283 U. S. 235 (1931) 30

Page

Story Parchment Co. v. Patterson Co., 282 U. S. 555 (1931) 15, 93, 94, 95, 106
Straus v. Victor Talking Machine Co., 297 Fed. 791 (1924) 106

T.

Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426 (1907) 53

U.

United Leather Workers v. Herkert & Meisel Trunk Co., 265 U. S. 457 (1924) 67
United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344 (1922) 106
United States v. E. C. Knight Co., 156 U. S. 1 (1895) .. 67
United States v. Moore, 275 Fed. 992 (1920) 68, 69
United States v. United States Steel Corp., 223 Fed. 55 (1915) 84, 90
251 U. S. 417 (1920) 83, 84
United States v. Winslow, 227 U. S. 202 (1913) 86
United States Navigation Co. v. Cunard S. S. Co., 284 U. S. 474 (1932) 55
Utah Power & Light Co. v. Pfost, 286 U. S. 165 (1932). 67

V.

Van Huffel v. Harkelrode, 284 U. S. 225 (1931) 44
Virtue v. Creamery Package Co., 227 U. S. 8 (1913) ... 42
Vitagraph Company of America v. Swaab, 248 Pa. 478 (1915) 79

W.

Washington Gas Light Co. v. Lansden, 172 U. S. 534 (1889) 40, 41
Williams v. Fears, 179 U. S. 270 (1900) 68

CHRONOLOGICAL INDEX OF ACTS OF CONGRESS CITED.

Page

Interstate Commerce Act of February 4, 1887, sections 8 and 10 (4) (49 U. S. C. A. 8, 10)....1, 5, 12, 14, 15-39, 44-57, 62, 75-77, 102-103, 109

Sherman Anti-Trust Act of July 2, 1890, sections 1, 2 and 7 (15 U. S. C. A. 1, 2 and 15n)....1, 5, 12, 14, 15, 18, 31-39, 50-57, 58, 59, 68, 69-88, 93-97, 103-109

Elkins Act of Feb. 19, 1903 (49 U. S. C. A. 41-43).... 57

Employers' Liability Act of April 22, 1908, section 1 (45 U. S. C. A. 51)..... 61

Clayton Act of October 15, 1914, section 4 (15 U. S. C. A. 15) 103-109

INDEX OF STATE STATUTES CITED.

Pennsylvania Act of June 4, 1883 (P. L. 72).....106, 107

INDEX OF UNITED STATES CONSTITUTION CITED.

Article I, Section 8, clause 3..... 57-73

IN THE

Supreme Court of the United States.

No. 351. October Term, 1935.

TERMINAL WAREHOUSE COMPANY (PLAINTIFF-APPELLEE IN THE COURT BELOW),

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY AND MERCHANTS WAREHOUSE COMPANY (DEFENDANTS-APPELLANTS IN THE COURT BELOW),

Respondents.

BRIEF FOR RESPONDENTS.

I. CONCISE STATEMENT OF THE CASE.

The present action for treble damages under the Sherman Act is founded upon an alleged combination and conspiracy between respondents to destroy petitioner's warehousing business and to gain for Merchants a monopoly of Philadelphia's warehousing business and for Railroad the complementary transportation services.

Prior to the commencement of the present action, the same matters herein complained of were the subject of a proceeding before the Interstate Commerce Commission brought by the petitioner and others against The Pennsyl-

vania Railroad and other railroads. The steps taken in that proceeding were as follows:

April 26, 1928: *Formal Complaint* Docket No. 20968 filed, charging unlawful rebates and discriminatory practices by Railroad in violation of the Interstate Commerce Act and praying for a cease and desist order and reparation (R. 451-456);

June 27, 1928: *Order of Commission* permitting intervention of Merchants Warehouse Company (R. 475);

December 28, 1929: *Report and Order of Commission*, finding the allowances by Railroad to Merchants to be illegal rebates, ordering Railroad to cease and desist from publishing or making such allowances and to cancel the tariff provisions under which the facilities of Merchants' warehouses were made a part of Railroad's station facilities, and denying reparation (R. 476-485) (Officially reported in 160 I. C. C. 563, 1929);

February 24, 1930: *Petition of Complainants for Reconsideration* in respect of reparation by the entire Commission and for further hearing (R. 486-499);

August 23, 1930: *Complaint* Docket No. 23790 filed, reciting prior complaint of April 26, 1928 and report and order of Commission thereon, and praying for reparation for additional damage arising during the prosecution of the case (R. 513-519);

October 8, 1930: *Decision of statutory court* for Eastern District of Pennsylvania dismissing bill in equity by Merchants seeking to annul and set aside the Commission's order of December 28, 1929 (Officially reported as Merchants Warehouse Co. v. United States et al., 44 Fed. (2d) 379);

May 18, 1931: *Decision of this Court* dismissing appeal of Merchants and affirming order of Commission (Officially reported as. Merchants Warehouse Co. v. United States, et al., 283 U. S. 501);

June 1, 1931: *Order of Commission* denying petition for reconsideration in Docket No. 20968 (R. 512); and

May 9, 1932: *Order of Commission* dismissing complaint in Docket No. 23790 (R. 522).

The present action under the Sherman Act was instituted by petitioner and Statement of Claim filed on March 12, 1932 (R. 1).

Paragraph 9 of the Statement of Claim avers that said combination and conspiracy was carried out by means of a series of written contracts extending over thirty years whereby Railroad made certain payments to Merchants for services rendered in and about the receipt and delivery of incoming and outgoing freight and Merchants gave preference in all its facilities to Railroad (R. 10-11).

Paragraph 10 avers that Railroad has since 1912, in accordance with its published tariffs, loaded and unloaded without charge package freight at Merchants' warehouses; and that the payments to Merchants resulted in cheaper rates and charges for interstate traffic to Merchants than to Terminal (R. 11). Paragraph 11 charges that the said payments *amounted to discriminatory and illegal rebates* and that the services rendered by Merchants were not transportation services (R. 11). Paragraph 13 avers that Merchants used said payments to subsidize its warehousing business and to stimulate and promote its trade (R. 12).

Paragraphs 14 and 15 aver that Railroad granted free demurrage to Merchants and that Railroad constructed and

maintained at its expense side-tracks to Merchants' warehouses, whereas petitioner and other competing warehouse companies had to construct and maintain their own side-tracks (R. 12-13). Paragraphs 16 and 17 aver that Merchants has routed substantially all of its traffic over Railroad's lines and that Railroad has solicited business for Merchants and advertised Merchants' warehouses as public freight stations of Railroad (R. 13-14).

Paragraph 18 charges that because of the alleged free demurrage, free side-tracks, preferential diversion of traffic and illegal rebates, Merchants charged less than the fair, just and normal value for its services, loaded and unloaded package freight without charge and allowed shippers forty-eight hour free storage at its warehouses with the result that respondents secured more than their just, fair and normal portion of the warehousing and complementary transportation business in Philadelphia and particularly a monopoly in the heavier commodities such as flour, newsprint paper, canned goods and sugar (R. 14).

Paragraph 19 charges that due to the alleged combination and conspiracy, Terminal was prevented from obtaining its fair, just and normal share of Philadelphia's warehousing business and lost the profits it would have otherwise made therefrom; and further charges that its profits on business actually transacted were lessened by reason of the reduction of its charges far below the fair, just and normal amount (R. 14-15). Paragraph 20 claims treble damages in the sum of $4,500,000. together with costs and a reasonable attorney's fee under section 4 of the October 15, 1914 Act (R. 15).

Respondents filed separate demurrers respectively setting forth that (1) the court lacked jurisdiction, (2) no

cause of action existed under the Sherman Act, (3) the agreements between respondents did not violate the Sherman Act, and (4) the averments of damage were too vague (R. 94-95).

The demurrers were overruled (R. 96-103); and exceptions thereto were allowed respondents (R. 104-105).

Merchants, pursuant to the Pennsylvania practice in trespass actions, filed a statutory affidavit of defense denying all averments of an alleged conspiracy to restrain interstate commerce and to monopolize trade among the states (R. 117).

Railroad filed an affidavit of defense on the merits, in which it admitted the several contracts and the payments thereunder but denied any unlawful combination and conspiracy and the means alleged to have been pursued in furtherance thereof and further denied all liability. Railroad demanded proof of the alleged damages (R. 106-114).

Railroad also averred that Terminal had sought but been denied, in a prior proceeding before the Interstate Commerce Commission, the same damages for the same alleged business injury as form the subject matter of the present suit; and that, therefore, that proceeding and denial constituted a bar to this action (Par. 21; R. 114-115).

In support of the conspiracy charge, petitioner offered in evidence the nine last contracts between respondents (Pl. Ex. 1; R. 18-93, 150-151), whereby Railroad agreed to pay Merchants for services rendered in and about the receipt and delivery of incoming and outgoing freight at certain stipulated rates; and also Railroad's tariffs during the period of suit with their provisions for payments to Merchants for handling at certain designated warehouses inbound and outbound freight on Railroad's lines (Pl. Ex.

2; R. 151-153, 407-408). This was followed by oral and documentary proofs respecting respondents' advertising and soliciting practices, the location and floor area of Merchants' warehouses, the varying payments from a minimum of 35¢ to a maximum of 50¢ per ton made to Merchants by Railroad pursuant to the contracts, and Railroad's construction and maintenance of sidings to Merchants' warehouses as part of the consideration for the series of contracts between respondents (Pl. Exs. 3-9; R. 153-166).

Petitioner then called its certified public accountant, who had examined Railroad's books and records under a court order in advance of trial, and offered through him over the objection of respondents' counsel various schedules showing payments to Merchants by Railroad of $634,886.16 during the period of suit, records of alleged car detention with demurrage charges therefor, and the division of Merchants' tonnage for a selected nine months' period into 77.6 per cent. for interstate traffic, 19.5 per cent. for intrastate and 2.5 per cent. not classified, as to which proofs objections were made by respondents' counsel and exceptions allowed (Pl. Exs. 19 & 20; R. 166-175, 246-250). Petitioner next called its president to prove the nature and scope of its warehousing business, the location of its warehouses with their 3,000,000 sq. ft., its methods of doing and soliciting business and the comparison and similarity of its business with that of Merchants (Pl. Exs. 10-12; R. 175-184).

In support of its damage claim for diminished profits on actual business, petitioner's president stated that Terminal had to pay demurrage for car detention and pay for construction and maintenance of side-tracks to its warehouses (Pl. Exs. 13 & 14; R. 184-187); that Terminal had

to charge its customers for handling inbound and outbound freight and could not meet Merchants' offer of free service in that regard because Terminal received no railroad allowance (Pl. Exs. 15-17; R. 188-195); and that the effect of Merchants' free service on Terminal's business was that Terminal could not handle heavy density products and had to reduce its rates on light density products to counteract said free service (R. 195-197). Upon objection of respondents' counsel, petitioner's president was not at first permitted to give an estimate of the loss alleged to have been sustained by reason of the receipt of less than petitioner's normal charge on business actually transacted by it during the period of suit (R. 197-201); but was subsequently allowed to offer in evidence the same compilation showing a difference of $536,278.35 between petitioner's so-called normal charge and the charge actually made and received thereon (Pl. Ex. 18; R. 234-238), even though petitioner's president was forced to admit on cross-examination that petitioner's "normal rate" was not the prevailing warehouse rate but was only the rate petitioner knew it had to get in order to pay its costs (R. 213-214, 235-237).

Upon cross-examination by respondents' counsel, petitioner's president admitted that Terminal and its wholly owned subsidiary had in its warehouses a floor area of sixty-eight acres or approximately 3,000,000 sq. ft., as compared with Merchants' 1,500,000 sq. ft.; that Terminal had not entered the warehousing business in Philadelphia until 1904, some twenty years after Merchants started business; that Terminal was in competition with the other ten competing warehouse systems of Philadelphia and received over 60 per cent. of its rail-borne traffic by the Reading Railroad, which Railroad made no allowance to

Merchants but had contracts with the Pennsylvania Warehousing and Safe Deposit Company similar to the contracts between respondents; and that in the prior Interstate Commerce proceeding against the Pennsylvania and Reading Railroads, the contracts between the Reading Railroad and the Pennsylvania Warehousing and Safe Deposit Company had been offered in evidence in support of petitioner's claim for damages against both Railroads (R. 202-230).

Petitioner concluded its proofs by showing that Merchants charged nothing for goods handled during the forty-eight-hour free period and collected no demurrage for car detention and that between 35 per cent. and 75 per cent. of Merchants' tonnage was delivered within the forty-eight-hour free period; but in so showing, brought out that Pennsylvania Warehousing and Safe Deposit Company granted to its customers the same free forty-eight-hour handling service and the same free demurrage and also charged the regular storage rates as Merchants did (R. 238-245).

In rebuttal of the conspiracy charge, respondents offered oral and documentary proofs to show that the relationship between Merchants and Railroad arose in 1886 to meet a pressing business need and had continued unchanged through the long series of contracts; that a like arrangement had existed for years between the Pennsylvania Warehousing and Safe Deposit Company and the Reading and B. & O. Railroads; that the forty-eight-hour free handling service had long been the Philadelphia practice for both rail and water-borne traffic; and that warehouse rates in Philadelphia had been more or less standardized through negotiations with the Commercial Exchange and by competition between the ten or twelve competing warehouse systems in Philadelphia and also with Baltimore and

Wilmington warehouses (Defs. Exs. 1-4; R. 251-290, 411-439). They further showed that Merchants and Pennsylvania Warehousing and Safe Deposit Company were in active competition for heavy density products; that they both charged the full regular rates and never cut prices like Terminal; and that the 50¢ per ton handling charge had the approval of the federal and state authorities (Defs. Exs. 5, 7 & 8; R. 262-265, 267-268, 285-287, 290-318, 320-327, 368-372).

Respondents further proved by a large number of merchants who had used in their business the warehouses of Merchants, Terminal and the other ten competing systems, that they had selected Merchants because of superior service and more convenient location of its warehouses; that Merchants had always charged the full regular rates prevailing in Philadelphia, which rates were fixed by competition or in negotiation with the Commercial Exchange and were not less than the rates in other cities; that they had continued to do business with Merchants through the years because of their highly satisfactory relations with Merchants and had refused to change to Terminal, although solicited at much lower rates; and that forty-eight-hour free handling service prevailed at Pennsylvania Warehousing and Safe Deposit Company and other Philadelphia warehouse systems and was therefore no inducement for using Merchants' warehouses (R. 319-320, 328-368).

In answer to petitioner's alleged damages, respondents offered oral and documentary proofs showing that during the period of suit Merchants' percentage of Philadelphia's total rail-borne warehousing traffic decreased from 42 per cent. in cars to 27 per cent., whereas Terminal's business conversely increased from 26 per cent. to 44 per cent.; that

at least 60 per cent. of Terminal's rail-borne tonnage was carried by the Reading and B. & O. Railroads; that Terminal's tonnage and floor space more than equalled the combined tonnage and floor space of its two closest rivals, Merchants and Pennsylvania Warehousing and Safe Deposit Company, even though Terminal's entry into the Philadelphia field postdates that of said rivals by twenty years and upwards; and that Terminal's so-called "normal rate" was so far above Philadelphia's prevailing rates that no other warehouse had ever even approached Terminal's "normal rate", not even after the great rise in rates with the adoption of the 1933 Code for warehouses (Defs. Exs. 6, 9, 10 & 11; R. 265-266, 380-399, 443-449).

Respondents' concluding proofs covered an exemplified copy of the prior proceeding before the Interstate Commerce Commission in which petitioner sought but was denied the same damages for the same injury to its business that are claimed in the present action; and the supplemental agreement of August 2, 1926, between the Pennsylvania Warehousing and Safe Deposit Company and the B. & O. Railroad (Defs. Exs. 12 & 13; R. 386-394, 451-522). The Commission denied reparation because of petitioner's failure to prove damage (R. 484-485). Misconstruing the Commission's report, petitioner throughout its brief asserts that the Commission denied damages because of a lack of jurisdiction, which, petitioner alleges, existed because the damages claimed were not "attributable directly" to any violation of the Interstate Commerce Act. This fallacious assertion will be discussed later (pp. 13-14, 45-49, infra).

Upon these proofs the trial judge left to the jury three questions, namely (1) did respondents engage in an unlawful combination and conspiracy, (2) has petitioner suffered

any loss or injury to its business or property, and (3) if so, the extent thereof (R. 524-547). The jury brought in a verdict for $136,125 (R. 555).

Petitioner filed its motion for judgment and to treble damages (R. 612-613), to which respondents filed answers denying, both on the merits and as a matter of law, the power of the Court to treble the amount of the verdict (R. 613-616). Petitioner also filed its petition for allowance of a counsel fee (R. 616-619), to which respondents filed a joint answer opposing the allowance of a counsel fee as a matter of law (R. 619-624). The Trial Court subsequently trebled the amount of the verdict, directed the entry of judgment in the sum of $410,338.81, and, in addition thereto, allowed petitioner a counsel fee of $27,000, to be taxed as part of the costs (R. 625-628).

The District Court and the Circuit Court of Appeals held that the damages claimed in the present action and awarded by the jury were the same damages that the Commission had denied (R. 603, 604, 606, 662-663). Petitioner also concedes this uncontradictable fact (R. 606).

The trial judge held that the Commission lacked jurisdiction to award the damages recovered in the present action and therefore decided that the Commission's denial of those damages did not bar the present action (R. 605-611). On appeal, the Circuit Court of Appeals determined that the Commission had jurisdiction to award such damages and reversed upon the sole ground that the present action was barred by the prior proceeding before the Commission (R. 663-665).

II. ARGUMENT.

The assignments of error filed by the respondents in the court below raised the following questions:

May damages denied by the Commission be recovered in a subsequent action under the Sherman Act?

(Section A., p. 15 of this Brief.)

Is not the cause of action sought to be advanced by petitioner in this case one under the Interstate Commerce Act and not under the Sherman Act?

(Section B-1, p. 50 hereof.)

Is Merchants' general warehousing business in Philadelphia interstate commerce within the meaning of the Constitution?

(Section B-2, p. 57 hereof.)

Did respondents unlawfully combine and conspire in violation of the Sherman Act?

(Section B-3, p. 73 hereof.)

Was there any proper proof of any damage to petitioner?

(Section B-4, p. 88 hereof.)

Did the trial judge err in trebling the jury's verdict and allowing an attorney's fee?

(Section B-5, p. 103 hereof.)

The Circuit Court of Appeals in reversing the judgment decided only the first question and concluded that the present action was barred by the prior Interstate Commerce proceeding (R. 658-665). It was thus unnecessary for that court to consider the other substantial and equally controlling questions submitted to it and here again relied

upon. Petitioner's assignments of error (Brief, p. 9) attack the court's conclusion as erroneous. The first part of this brief will show that no error was committed by the Circuit Court of Appeals in reversing the judgment upon this sole ground.

We deem it necessary primarily and at once to call this Court's attention to petitioner's misconstruction of the Report of the Commission (Defs. Ex. 12; R. 476-485) by giving to the words "*attributable directly*" an unwarranted interpretation. The misconstruction is repeated throughout petitioner's brief (pp. 7-8, 11, 14, 26-28) in an effort to discredit the opinion of the Circuit Court of Appeals. Petitioner states that the Commission denied reparation "on the correct ground that the business losses petitioner sought to recover were not 'attributable directly' to the violations of the Interstate Commerce Act shown in that case" (Brief, pp. 7-8). This statement is based on the following sentence in the Report: "The evidence is far too vague and indefinite to warrant the conclusion that complainants have suffered actual pecuniary *loss attributable directly to the alleged unlawful practices*" (R. 484-485).

By excising this sentence from its context and by emphasizing the words "attributable directly", petitioner seeks to change the finding by the Commission, that damage had not been established by sufficient evidence, into a holding by the Commission that reparation was denied because the Commission lacked jurisdiction to award it, and attempts to assert that the Commission has declared in effect that it had no jurisdiction to award reparation. This is an attempt by suggesting a misconstruction in the findings of the Commission to undermine one of the fundamental positions of the respondents sustained by the Circuit Court of Appeals, and is totally without basis or justification.

The Report of the Commission shows that petitioner was granted full opportunity to present its case and that its evidence, as presented, was so vague and indefinite that no award of reparation could be made. The following sentences from the Report establish that reparation was denied for a lack of proof of damages and not through any lack of jurisdiction to award them (R. 484-485):

> "Complainants have been accorded ample opportunity to present facts supporting an award of reparation. Their case must stand or fall on the facts now of record. *The evidence* is far too vague and indefinite to warrant the conclusion that complainants have suffered *actual pecuniary loss attributable directly to the alleged unlawful practices. Damage must be shown with certainty* to support an award of reparation under findings of unjust discrimination or undue prejudice. Penn. R. R. Co. v. International Coal Co., 230 U. S. 184, 206. Reparation is denied." (Italics supplied.)

Our interpretation of the finding of the Commission is supported by its citation of the case of *Penn. R. R. Co. v. International Coal Co.*, where the Court held the evidence was insufficient to warrant the recovery of damages.

The second part of this brief will consider in the above order the other five grounds for reversing the judgment, namely, that (1) the cause of action averred by petitioner in this case is under the Interstate Commerce Act and not under the Sherman Act; (2) the general warehousing business of Merchants in Philadelphia is not interstate commerce within the meaning of the Constitution; (3) respondents did not unlawfully combine and conspire in violation of the Sherman Act; (4) no damage to petitioner was proved; and (5) the trial judge erred in trebling the jury's

verdict and allowing an attorney's fee. This Court stated in *Story Parchment Co. v. Patterson Co.*, 282 U. S. 555 (1931), at pages 567-568, that on a certiorari, the entire record was before it with full power to review not only the assignments of error considered by the Circuit Court of Appeals, but also the other assignments of error from the District Court which might have been but were not passed upon by that appellate court.

A. THE PRESENT ACTION IS BARRED BY THE PRIOR PROCEEDING BEFORE THE INTERSTATE COMMERCE COMMISSION.

From the inception of the present action respondents have at every stage maintained that petitioner, having proceeded under the Interstate Commerce Act and having asked damages by reparation from the Commission, is now barred from recovering the same damages under the Sherman Act (Respondents' Assignments of Error, Nos. 1, 5, 7, 30, 31, 32, 42, 46 & 47; R. 636-38, 646, 649-50): Consequently, we shall demonstrate that the alleged lost profits claimed by petitioner and awarded by the jury are the identical damages sought from and denied by the Commission, that the Commission had full jurisdiction to grant such damages, and that damages refused by the Commission are not recoverable elsewhere. We shall then answer the several arguments advanced by petitioner for the first time in this Court in support of the contention that the present action is not barred by the prior Interstate Commerce proceeding.

1. The Commission denied the identical damages claimed in the present action and awarded by the jury.

The damages claimed by petitioner in paragraph 19 of its statement of claim were (a) lost profits on business of which petitioner was unfairly deprived and (b) shrunken or diminished profits on business actually transacted at lowered rates (R. 15). At trial, petitioner abandoned all claim of damage arising from any alleged lack of its fair, just and normal share of business and any anticipated profits therefrom (R. 201). This abandonment was not surprising in the face of respondents' uncontradicted proofs that petitioner's business had expanded enormously at the expense of Merchants so that by the year 1932 petitioner enjoyed 44 per cent. of Philadelphia's warehouse business as contrasted with Merchants' 27 per cent. (Defs. Ex. 6; R. 443-448).

Petitioner's proof of damage was therefore confined to an alleged loss of profits on actual business arising from the shrinkage or diminution of its charges below what petitioner called its "normal rate," (R. 197); by which term petitioner meant what it had to charge in order to pay its costs (R. 213-214, 235-237). Petitioner's so-called "normal rate" far exceeded the "prevailing rate" in Philadelphia (R. 380), which Merchants and other warehouses charged, which was more or less fixed by competition and which was not lower than the rate in any other part of the United States (R. 213, 346, 380-382).

The exemplified copy of the Interstate Commerce proceeding (Defs. Ex. 12; R. 451-522) discloses the damages therein claimed by petitioner were for the same alleged shrinkage or diminution of profits on actual business. After full hearings, the Commission reported in part (R. 484):

"Complainants confine the basis of their claim for reparation to damages resulting from shrinkage or diminution of their normal business profits."

Thereafter, petitioner petitioned the Commission for a further hearing, alleging that all elements of said damage save and except the amount had been proved and asserting that it was entitled to a further hearing to measure the damage (R. 486-499). After reviewing its extensive proofs before the Commission of alleged shrunken or diminished profits, petitioner maintained that the Commission had jurisdiction to award said damages (R. 497):

"The shrinkage or diminution of normal business profits, as claimed by the complainants, is based on actual and not theoretical business transactions, that is, it is based on actual business transactions which the complainants handled under the subnormal or 'cut' warehouse charges imposed by their subsidized competitors. Such curtailment or diminution of normal business profits is a foundation for reparation. Penna. R. R. Co. v. International Coal Company, 230 U. S. 184, 206; Cornell v. L. V. R. R., 57 I. C. C. 157, 164; Foster Lumber Co. v. V. & S. R. R. Co., 112 I. C. C. 651, 654; Puget Sound & Cascade Ry. Co. v. Director General, 91 I. C. C. 467, 470, 471. Damages also may be recovered for unlawful prevention of normal business gains. W. U. Tel. Co. v. Hall, 124 U. S. 444, 455."

The Commission took no action on the petition until this Court handed down its decision upholding the cease and desist order (283 U. S. 501); and thereupon denied the petition (R. 522).

The opinion of the statutory court in *Merchants Warehouse Company v. United States, et al.*, 44 Fed. (2d) 379 (1930), as well as the opinion of Mr. Justice Stone

in *Merchants Warehouse Company v. United States*, 283 U. S. 501 (1931), reveal that petitioner offered practically the same evidence before the Commission as was produced in the present case. In both proceedings, petitioner's proofs included the several contracts between Railroad and Merchants, Railroad's payment of allowances to Merchants and the amounts thereof, the important business advantages alleged to have been gained by Merchants over its competitors through the payment of such allowances, prevailing warehouse practices respecting the unloading and distribution of package freight and the granting of free handling during the forty-eight-hour period and the alleged resultant damages to petitioner.

The Circuit Court of Appeals in its opinion noted this telling parallel in petitioner's proofs and rightly concluded that the testimony of petitioner in both proceedings was substantially identical (R. 662-663).

Although forced to admit in the Courts below (R. 606) that the same damages were claimed and the same proofs thereof were submitted in both proceedings, petitioner seeks to qualify the admission by alleging that the present suit under the Sherman Act differs substantially from the proceeding before the Commission under the Interstate Commerce Act, in that certain additional matters, namely, the maintenance of side-tracks by Railroad, freedom from demurrage charges, and the solicitation of business by Railroad for Merchants are here averred as steps in the alleged conspiracy, but were not presented for the consideration of the Commission (Brief, pp. 23-24). These additional matters, petitioner argues, give rise to a separate and distinct cause of action for admittedly the self same injury.

The decision of the Commission (R. 476-485) shows clearly that, not only were the payments condemned, but

that the Commission gave consideration also to the general relation between Railroad and Merchants and ordered Railroad to cancel its tariff provisions which made the facilities of Merchants a part of the station facilities of Railroad. Thus the Commission said (R. 485):

> "Defendants will therefore be required to cease and desist from publishing or making such discriminatory and preferential allowances. The Pennsylvania and the Baltimore & Ohio will also be required to cancel their tariff provisions which make the facilities of the contract warehouses a part of the respective station facilities of these defendants at Philadelphia." (160 I. C. C. 563, 569.)

The same fact also appears in the opinion of this Court which, describing the order of the Interstate Commerce Commission, said (283 U. S. 501 at pages 503-504):

> "The order required the Reading Company and the Pennsylvania and Baltimore & Ohio railroads, interstate rail carriers, to cancel such provisions in their tariffs as purported to make the warehouses of appellants in Philadelphia a part of the station facilities of the carriers, and directed that they cease and desist from making allowances to appellants in connection with the loading and unloading of package freight at the latter's warehouses."

Following a full discussion of the status of the warehouses as station facilities (Pages 504-507), this Court reached the conclusion:

> "We think, as the court below held, that the Commission's finding that appellants' warehouses are not in fact public freight stations, is supported by the evidence."

The suggested qualification that other new matters are involved in this case (supra), such as freedom from demurrage, free use of side-tracks, assistance in solicitation of business, is beside the mark since all these were incidents of the status which Merchants had under its contracts as the operator of stations of Railroad (R. 273, 282-304, 320-327, 370). In other words, demurrage could not be assessed on a car awaiting unloading by the Railroad's own agents, since demurrage is the penalty imposed upon the consignor or consignee for failure to unload within a reasonable time. Furthermore, Railroad would naturally provide and maintain the track at its own stations and would solicit business for movement to and from such points as against movement to or from competitive points.

In the proceeding before the Commission, as in the present action, the contracts between Railroad and Merchants constituted the basis of the attack, and the incidental features referred to above as new material interjected in this case, were, in no proper sense, either new material or matters of consequence. They were all incidental to the underlying conception of the entire arrangement as embodied in the contracts, viz: that Merchants' warehouses constituted stations of Railroad, a relation which the Commission ordered discontinued, as indicated in the sentence above quoted.

Since the statement that no such matters were involved in the proceeding before the Commission finds no support in the present record, it is permissible for respondents to challenge the statement by a reference to the same contracts introduced in this case (R. 18-92, 411-415) which appear at pages 455 to 526 of the transcript of record in the *Merchants Warehouse Case,* 283 U. S. 501 (1931), the con-

tents of which are summarized in *Merchants Warehouse Company v. United States*, 44 Fed. (2d) 379 (1930) at pages 381 and 386, and in 283 U. S. 501 (1931), at pages 504 and 509.

2. The Commission had jurisdiction to award damages by way of reparation for actual lost profits.

Petitioner's counsel argued before the Commission that there was jurisdiction to allow damages by way of reparation for a shrinkage or diminution of normal profits on actual business transactions, and cited several cases before this Court and the Interstate Commerce Commission in support thereof (p. 17, supra). Patently, petitioner's counsel had to abandon that argument, when the trial judge's first opinion of May 4, 1934 (R. 598-604) made it necessary to take exactly the contrary position. This they promptly did, in the face of the many decisions of this Court sustaining that jurisdiction.

Section 8 of the Interstate Commerce Act (49 U. S. C. A. 8) expressly provides that a "common carrier shall be liable . . . for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter . . . ." This statutory provision has always been construed to authorize the recovery of consequential damages for injury to one's business including shrinkage or diminution or prevention of normal business profits. *Pennsylvania R. R. Co. v. International Coal Co.*, 230 U. S. 184 (1913), is a leading case in point, which counsel for petitioner cited in their petition for a further hearing, (R. 497), and which the Commission followed and applied in its report, (R. 485). The broad scope of the statutory term "full amount of damages" was declared by Justice Lamar as follows (pp. 203-204):

". . . There was no proof of injury—*no proof of decrease in business, loss of profits, expense incurred or damage of any sort suffered*—the plaintiff claiming that, as matter of law, the damages should be assessed to it on the basis of giving to it the same rate, on all its tonnage, that had been allowed on any contract coal shipped, on the same dates, whether such tonnage was great or small.

. . . . . .

"The statute gives a right of action for damages to the injured party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained. . . .

"If plaintiff and one of the favored companies had both shipped coal to the same market on the same day, the rebate on contract coal may have given an advantage which may have prevented the plaintiff from selling, may have directly caused it expense, or may have diminished or totally destroyed its profits. *The plaintiff, under the present statute, in any such case being then entitled to recover the full damages sustained;—*" (Italics supplied.)

In *Louisville & Nashville R. R. Co. v. Ohio Valley Tie Co.*, 242 U. S. 288 (1916), Justice Holmes applied the rule laid down in *International Coal Co.* (supra) and held that the award of damages under section 8 was conclusively presumed to include every item of damage attributable to the unlawful practices. There, the complainant recovered from the Commission reparation for unreasonable rates; and thereafter recovered a substantial verdict at law for injury to his business and credit. On appeal, the Kentucky Court of Appeals decided that the Interstate Commerce Act committed the Commission to granting special relief against

the overcharge, but that the satisfaction of the Commission's award still left open an action at law for general damages. In reversing the judgment, Justice Holmes said (pp. 290-291):

> "By section 8 a common carrier violating the commands of the act is made liable to the person injured thereby 'for the full amount of damages sustained in consequence' of the violation. . . . The decisions say that whatever the damages were they could be recovered; Pennsylvania R. R. v. International Coal Mining Co., 230 U. S. 184, 202, 203; Meeker v. Lehigh Valley R. R. Co., 236 U. S. 412, 429; and that the statute determines the extent of damages. Pennsylvania R. R. Co. v. Clark Brothers Coal Mining Co., 238 U. S. 456, 472. *We are of opinion that all damage that properly can be attributed to an overcharge, whether it be the keeping of the plaintiff out of its money, dwelt upon by the trial court, or the damage to its business following as a remoter result of the same cause, must be taken to have been considered in the award of the Commission and compensated when that award was paid.*" (Italics supplied.)

No such sweeping legal presumption as to damages need be invoked or resorted to in the present case because the Commission's report, petitioner's petition for a further hearing and the opinion of the Circuit Court of Appeals all disclose on their face that petitioner claimed before the Commission damages for lost profits on actual business transactions, which damages formed the basis of the present action under the Sherman Act and were awarded by the jury. The Commission denied these damages.

The most recent decision construing the damages recoverable under section 8 is that of *Interstate Commerce Commission v. United States*, 289 U. S. 385 (1933), which was

cited in the opinion of Circuit Judge Thompson as sustaining the jurisdiction of the Commission to award the damages claimed by petitioner (R. 663). In that case the Commission determined that the rates on lumber maintained by the carriers were unduly prejudicial to the complainant; but that the record would not support an award of damages. A writ of mandamus commanding the Commission to award damages was refused by the trial court. The Court of Appeals reversed and the case came before this Court on certiorari.

Mr. Justice Cardozo held that purely negative orders of the Commission were final and not subject to review by any court; and further that damages denied by the Commission could not be recovered elsewhere. He discussed the damages recoverable for discrimination under section 8 thus (pp. 390-391):

> "... *If by reason of the discrimination, the preferred producers have been able to divert business that would otherwise have gone to the disfavored shipper, damage has resulted to the extent of the diverted profits. If the effect of the discrimination has been to force the shipper to sell at a lowered market price* (Penn. R. Co. v. International Coal Co., supra, p. 207; Hoover v. Penna. R. Co., 156 Pa. St. 220, 244; 27 Atl. 282), *damages have resulted to the extent of the reduction.* But none of these consequences is a necessary inference from discrimination without more." (Italics supplied.)

Paraphrasing the language of Mr. Justice Cardozo, petitioner could recover under section 8 of the Interstate Commerce Act any damage resulting from a reduction in warehouse charges or diverted profits providing the same was caused by the alleged discriminatory practice complained of (R. 11-15); but the fact of damage must be proved and will not be presumed.

In the case of *Merchants Warehouse Company v. United States et al.*, 283 U. S. 501 (1931), involving the matters dealt with by the Commission, this Court held that the payments made by Railroad to Merchants were illegal rebates and discriminatory. This holding would warrant the recovery of full damages under the Interstate Commerce Act. In the case of *Keogh v. C. & N. W. Ry. Co.*, 260 U. S. 156 (1922), section 8 was construed by Mr. Justice Brandeis to mean (p. 162):

> ". . . Under section 8 of the latter act the exaction of any illegal rate makes the carrier liable to the 'person injured thereby for the full amount of damages sustained in consequence of any such violation' together with a reasonable attorney's fee. . . . If the conspiracy here complained of had resulted in rates which the Commission found to be illegal because unreasonably high or discriminatory, *the full amount of the damages sustained, whatever their nature, would have been recoverable in such proceedings.* Louisville & Nashville R. R. Co. v. Ohio Valley Tie Co., 242 U. S. 288." (Italics supplied.)

The decisive importance of the *Keogh* case lies in its holding that the Commission had jurisdiction to award lost profits to petitioner; and that such claim having been unsuccessfully made by petitioner in the prior Interstate Commerce proceeding, it may not recover the same damages in a subsequent action under the Sherman Act.

The jurisdiction of the Commission to award full damages for alleged discriminatory practices and in particular lost profits arising therefrom was declared in the following cases: *Hillsdale Coal & Coke Co. v. Pennsylvania Railroad Co.*, 23 I. C. C. 186 (1912); *Pennsylvania Railroad Co. v. Jacoby & Co.*, 242 U. S. 89 (1916); *Pennsyl-*

vania Railroad Co. v. Minds, 250 U. S. 368 (1919); and *Pennsylvania Railroad Co. v. Weber,* 257 U. S. 85 (1921). In these cases, an award by the Commission of not only lost profits on business actually transacted but also lost profits on business not obtained because of the alleged discrimination in the allotment of coal cars was sustained. The damages actually awarded by the Commission in the above cases are broader than the damages which this petitioner unsuccessfully claimed in the prior proceeding before the Commission; and therefore these cases are conclusive of the Commission's jurisdiction.

Petitioner does not question the above-cited decisions of this Court that section 8 of the Interstate Commerce Act permits the recovery of any damage, proximate or remote, to the complainant's business and that such damage includes shrinkage or diminution or prevention of normal business profits on actual transactions; but endeavors to avoid their binding effect by arguing that the Commission itself found that the injuries were not proximately caused by Railroad's payments to Merchants and that, therefore, it lacked jurisdiction to award reparation (Brief, pp. 7-8, 11, 14, 26-28). This unsound contention has been referred to in this brief (pp. 13-14 supra) and will be fully answered later (pp. 44-49 infra).

If this Court should accept the contention of petitioner that it suffered damage, not by reason of Railroad's infraction of the Interstate Commerce Act in granting rebates and other preferences to Merchants, but solely by virtue of Merchants' unfair use of the same to depress warehousing charges, and that, therefore, the Commission lacked jurisdiction to award reparation against Railroad, then there could be no recovery against rail carriers under section 8 of the Interstate Commerce Act for rebates and discrimi-

natory practices and the term "full damages" in that section would lose all meaning. Petitioner's theory that Merchants' intervening act was the sole cause of injury would afford a ready escape from liability by rail carriers, when sued under the Interstate Commerce Act for rebates and discriminatory practices. Thus in this action nothing alleged to have been done by Railroad would be the proximate cause of any damages alleged to have been suffered by petitioner.

3. Having elected to claim damages by reparation from the Commission, petitioner may not recover identical damages under the Sherman Act.

This Court has repeatedly declared that the findings of the Commission as to reparation are judicial in nature and final; and that damages denied by the Commission are not recoverable in any other court or tribunal. Both the trial judge and petitioner's counsel admit that a negative finding is just as binding as a positive award (R. 606). Where, as here, a complainant elects to proceed first before the Commission invoking not only its administrative jurisdiction (as shown by the cease and desist order) but also its judicial jurisdiction to give full damages by way of reparation, that complainant has had his day in court before a tribunal of his own selection, which in the very nature of things is better qualified to pass upon the complicated trade practices and relations that form the gravamen of the alleged wrong for which reparation is sought than any untrained jury in a court of law, and will not be permitted to seek elsewhere the damages denied by the Commission. And yet that is the very thing which petitioner aimed to accomplish by the present action.

The finality of orders of the Commission and the consequent barring of subsequent actions for damages previously denied by the Commission was recognized and followed by Mr. Justice Cardozo in *Interstate Commerce Commission v. United States,* 289 U. S. 385 (1933), the facts of which case have already been stated (pp. 23-24, supra). The following language is from the opinion (pp. 388, 394):

> ". . . . The respondent by its complaint to the Commission invoked this dual jurisdiction, the administrative jurisdiction to prescribe a rule for the future (Great Northern Railway Co. v. Merchants Elevator Co., 259 U. S. 285, 291; Baltimore & Ohio R. Co. v. Brady, 288 U. S. 448), and the judicial or quasi-judicial jurisdiction to give reparation for the past. Baltimore & Ohio R. R. Co. v. Brady, supra. *In dismissing such a complaint, the Commission speaks with finality. Its orders purely negative—negative in form and substance—are not subject to review by this court or any other.* Standard Oil Co. v. United States, 238 U. S. 235; Alton R. Co. v. United States, 287 U. S. 229; Proctor & Gamble Co. v. United States, 225 U. S. 282; Baltimore & O. R. Co. v. Brady, supra. *Damages for discrimination denied by the Commission are not recoverable somewhere else.*
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> . . . . . .
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> "*The policy of the law has been to give finality to orders of the Commission negative in form and substance, and to keep them out of the courts.* Standard Oil Co. v. United States, supra; Alton R. Co. v. United States, supra; Proctor & Gamble Co. v. United States, supra; B. & O. R. Co. v. Brady, supra. A dissatisfied complainant is not permitted to escape these limitations indirectly by broadening the functions of mandamus when he is barred from more direct review. I. C. C. v. Waste Merchants Assn., supra, p. 35. There

have been like attempts before in other branches of the law of remedies. In re Pennsylvania Co., 137 U. S. 451, 454; Missouri Pacific Ry. Co. v. Fitzgerald, 160 U. S. 556, 581. They have met with no success." (Italics supplied.)

A leading State authority affirming the finality of Commission orders and refusing to allow a subsequent action at law involving the same damages is that of *N. Y. C. R. R. v. Gen. Elec. Co.*, 83 N. Y. Misc. 529 (1914), in which case a counter-claim was dismissed because of a prior adverse ruling of the Commission. Judge Van Kirk ruled (p. 548):

> "The plaintiff maintains that this matter has once been determined by the Interstate Commerce Commission, and that that determination is conclusive upon the claim in question. . . . Upon the same facts as appear in this case at bar, the Commission made its decision and entered an order dismissing the complaint. . . .
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> . . . . . .
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> "While, under the decision upon the merits above made it is not necessary to pass upon this question, it would seem that, where the identical question has been tried before a competent tribunal authorized to try that question, where the records show that the facts are the same in the two cases, and the records in the proceedings before the Interstate Commerce Commission show the determination made by that Commission, and where the party who is here seeking to maintain the claim *is the same party which selected its own tribunal,* brought the matter before the Commission and secured a determination after a full hearing, the decision of the Commission ought to be conclusive upon the parties." (Italics supplied.)

That a disappointed complainant may not circumvent an adverse Commission order and obtain a trial *de novo* by

bringing a subsequent action at law was ruled in *B. & O. R. R. Co. v. Brady,* 288 U. S. 448 (1933). This was an action at law to enforce a reparation order. The petitioner asked damages several times in excess of the award; and the defendants' demurrer to damages in excess of the award was overruled. The jury brought in a verdict many times greater than the award, which verdict the Circuit Court of Appeals affirmed. In reversing, Mr. Justice Butler stated (pp. 457, 458-459):

> "But having elected to seek relief through the Commission, plaintiff is not entitled to recover more than the amount of the award.
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> . . . . . .
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> ". . . The right of election given to a claimant reasonably may have been deemed an adequate ground for making the Commission's award final as to him. Confessedly, it is final save when carriers refuse to pay within the time allowed. *If by such a suit plaintiff may obtain a trial de novo or a revision of the award, the provisions of section 9 requiring election and prohibiting pursuit of both remedies would be set at naught in cases in which carriers refuse to pay and would be given effect in all other cases.* There is no support for such a distinction. The construction for which the plaintiff contends cannot be sustained. He is bound by the award." (Italics supplied.)

Similar cases reaching a like result are *Standard Oil Co. v. United States,* 283 U. S. 235 (1931) at pp. 240-241 and *Hillsdale Coal & Coke Co. v. Penna. R. R.,* 237 Fed. 272 (1916) at p. 274.

An instance of where an unsuccessful complainant before the Commission was not allowed to claim the same damages under a Pennsylvania statute providing for the

award of treble damages for injuries suffered through discriminatory practices of a common carrier is afforded by *Penna. R. R. Co. v. Clark Coal Co.*, 238 U. S. 456 (1915). In setting aside treble damages based on discriminatory car distribution, the then Mr. Justice Hughes said (p. 472):

> ". . . But when, as a result of its own insistence upon its Federal right under the Act, it appeared that the Act had been violated and that the special remedial provisions of the Act were applicable, it was not possible for the plaintiff to ignore the statute it had thus called into play and disregard its provisions for the purpose of measuring relief by local standards. The Federal statute governed the plaintiff no less than the defendant. In the situation in which the plaintiff stood after the Commission's finding, that statute determined the extent of the damages it was entitled to recover with respect to interstate sales and shipments, *and the plaintiff was not free to seek another remedy in the state court and there to secure treble damages under the state statute with respect to the same transactions.*" (Italics supplied.)

A necessary corollary to the general doctrine that damages denied by the Commission are not recoverable in a court of law is the rule that the Sherman Act does not provide an additional remedy for cases cognizable under the Interstate Commerce Act. Were the law otherwise, a complainant could first invoke the jurisdiction of the Commission and recover damages by reparation for an alleged injury, and thereafter could invoke the jurisdiction of a court of law under the Sherman Act and recover treble damages for the same injury. That is exactly what petitioner sought to accomplish by the present action.

As was said by Judge Thompson in writing the opinion of the Circuit Court of Appeals (R. 664):

"Several statutory remedies were available to Terminal. It could have petitioned the Interstate Commerce Commission for an order directing the offending common carrier to cease and desist from the unlawful practices and for an award of damages; or it could have sued in the appropriate District Court for an award of damages or treble damages. It did not have the right, however, to pursue each of the above remedies successively until such time as it found a tribunal which would award the damages sought. As we have already stated, Terminal did in fact petition the Interstate Commerce Commission for a cease and desist order, which was granted, and for an award of damages, which was denied. Terminal thereby elected its remedy, and is barred from subsequent action for the same damages."

In holding that petitioner could not maintain an action under the Sherman Act, the Circuit Court of Appeals followed *Keogh v. C. & N. W. Ry. Co.*, 260 U. S. 156 (1922) which was an action under section 7 of the Sherman Act for damages resulting from an unlawful conspiracy between several railroads to establish high rates, whereby the plaintiff claimed he had been injured. The Commission had previously found that the rates were reasonable, but the plaintiff contended that the rates were higher than they would have been had there not been a conspiracy. In affirming a judgment in favor of the defendant railroads, Mr. Justice Brandeis held, *inter alia,* that even if the rates had been found to be illegal by the Commission, *there was no right of action under the Sherman Act because there was an ample remedy under the Interstate Commerce Act,* stating (p. 162):

". . . Under section 8 of the latter act the exaction of any illegal rate makes the carrier liable to

the 'person injured thereby for the full amount of damages sustained in consequence of any such violation' together with a reasonable attorney's fee. Sections 9 and 16 provide for the recovery of such damages either by complainant before the Commission or by an action in a federal court. *If the conspiracy here complained of had resulted in rates which the Commission found to be illegal because unreasonably high or discriminatory, the full amount of the damages sustained, whatever their nature, would have been recoverable in such proceedings.* Louisville & Nashville R. R. Co. v. Ohio Valley Tie Co., 242 U. S. 288. *Can it be that Congress intended to provide the shipper, from whom illegal rates have been exacted, with an additional remedy under the Anti-Trust Act?* See Meeker v. Lehigh Valley R. R. Co., 162 Fed. 354. And if no remedy under the Anti-Trust Law is given where the injury results from the fixing of rates which are illegal, because too high or discriminatory, may it be assumed that Congress intended to give such a remedy where, as here, the rates complained of have been found by the Commission to be legal and while in force had to be collected by the carrier? . . ."

As hereinbefore noted (pp. 2, 17-19, supra) the Commission held that the action originally complained of by this petitioner resulted in illegal rebates, and this Court affirmed the Commission (283 U. S. 501).

In compliance with the doctrine of the *Keogh* case that the Sherman Act did not provide a cumulative remedy, the Fourth Circuit Court of Appeals held in the recent case of *Glenn Coal Co v. Dickinson Fuel Co., et al.*, 72 Fed. (2d) 885 (1934) (C. C. A. 4) that a cause of action did not exist under the Sherman Act for treble damages for an alleged unlawful registration of a trade-mark, which trade-mark registration was averred to be a step in an unlawful con-

spiracy in violation of the Sherman Act. Citing the *Keogh* case as authority, District Judge Chesnut said (pp. 888-889):

> ". . . We think it quite unreasonable to conclude that it was the intention of Congress in providing for three-fold damages in a civil suit for violation of the Anti-Trust Act to have intended to thereby give to a plaintiff in a case of this kind three-fold damages in addition to those given by the trade mark law, merely on the allegation that the registration was in furtherance of a conspiracy to violate the Anti-Trust Act. See Keogh v. C. & N. W. Rwy. Co., 260 U. S. 156, 162, 43 S. Ct. 47, 67 L. Ed. 183. Such a construction would necessarily extend the scope of the latter Act to cases beyond its fair import and make it possible to convert almost any and every trade mark controversy into a civil suit under the Sherman Act."

Similarly we assert that an action for discriminatory practices under the Interstate Commerce Act cannot be converted into an action for treble damages under the Sherman Act, as petitioner attempts to do in the present suit.

In the present case, petitioner has made its election to recover damages under the Interstate Commerce Act. If it had had any cause of action under the Sherman Act, it would have been too late to bring such an action after an application for reparation under the Interstate Commerce Act had been made to the Commission, and action thereon taken by it.

4. Sundry new matters advanced by petitioner in this Court as reasons why the present action is not barred by the prior Interstate Commerce proceeding.

In the courts below petitioner conceded that if the Commission had jurisdiction to award the damages allowed by the jury it could not recover in the present action. The trial judge stated this concession as follows (R. 606):

> "The experienced counsel for plaintiff, having the courage of his convictions, has frankly made two admissions. He admits that the plaintiff made claim before the Commission for reparation, which included the same damages which the jury awarded, and further admits that *if the Commission had the jurisdictional power to award the damages allowed by the jury, the plaintiff cannot recover in the instant case.*"

Petitioner now repudiates that concession and argues that even though recovery may possibly be barred against Railroad, yet the prior Interstate Commerce proceeding is no bar against Merchants because the Commission could not grant reparation against a non-carrier (Brief, p. 11).

Petitioner also argues in this Court for the first time that the Commission's denial of reparation should not bar a subsequent action against both respondents under the Sherman Act because the damages claimed against Railroad before the Commission were not "attributable directly" to any violation by Railroad of the Interstate Commerce Act and hence the Commission lacked statutory authority to award said damages. This new argument likewise involves a repudiation by petitioner of its position before the Commission that there was jurisdiction to award the damages claimed.

These two major departures from petitioner's prior legal position will be answered in order. Petitioner's brief contains many minor inaccurate statements of fact and misleading arguments that will not be considered under separate headings of this brief but will be noted and answered, as occasion demands.

(a) The instant judgment may not be reinstated against Merchants alone.

Petitioner first maintains that the prior Interstate Commerce proceeding is no bar to recovery against Merchants in the present case because the Commission lacked jurisdiction to award damages against a non-carrier. Utterly misconceiving the argument of respondents, petitioner would like to make it appear that respondents contend that recovery against Merchants is barred because the Commission had jurisdiction to award damages against a non-carrier (Brief, pp. 14-16)

Petitioner consistently pronounces that the decision of the Circuit Court of Appeals is based upon the supposed jurisdiction of the Commission to award joint damages against Railroad and Merchants (Brief, pp. 14-16). To substantiate this misinterpretation, a sentence is lifted out of the opinion of Circuit Judge Thompson and surrounded by a context wholly different from anything said in the opinion.

No such contention was ever made by respondents. This can be seen by reference to respondents' Points for Charge in the trial of the case (R. 548-554), and to their Assignments of Error (R. 636-50). Likewise, the opinion discloses on its face that Circuit Judge Thompson did not misunderstand the authority of the Commission.

In the course of their argument that the Interstate Commerce Act and the Sherman Act did not provide cumulative remedies and that by electing to claim damages by reparation from the Commission under the Interstate Commerce Act petitioner could not subsequently recover identical damages for the same injury under the Sherman Act (pp. 27-34, supra), respondents pointed out that Merchants voluntarily intervened and became a party to the

proceeding before the Commission and therefore would be estopped from later contesting the findings by that body had petitioner pursued its remedy under *Section 10-4 of the Interstate Commerce Act against Merchants as the alleged favored shipper. Because of the Commission's fact finding of no damage, petitioner chose to abandon its remedy against Merchants under Section 10-4 of the Interstate Commerce Act and sought to overcome the Commission's denial of reparation by invoking the Sherman Act against both respondents.

But petitioner may not thus disregard its earlier election to proceed under the Interstate Commerce Act. Where, as here, a federal statute provides a complete remedy against two alleged wrongdoers and the injured party invokes its statutory provisions against one wrongdoer and obtains partial relief thereunder, the election to proceed under the statute would prevent the subsequent invocation of another statutory remedy, even had it existed in the first instance, whereby the injured party seeks to cumulate its

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*Interstate Commerce Act of February 4, 1887, section 10-4 (49 U. S. C. A. 10):

"4. *Inducing unjust discrimination; penalty; liability for damages.* If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce any common carrier subject to the provisions of this chapter, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty of a misdemeanor and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding $5,000, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom."

remedies and recover in the subsequent action what was denied in the first action. To hold otherwise would mean that the injured party could recover full damages under the Interstate Commerce Act against both respondents and then recover treble damages under the Sherman Act as an additional cumulative remedy contrary to the repeated rulings of this Court.

By invoking as a bar to recovery against Merchants alone under the Sherman Act the prior election of petitioner to proceed under the Interstate Commerce Act, Merchants is relying upon the sound principle of law that even if the Sherman Act had provided a remedy for petitioner in the absence of resort to the Commission, petitioner's election to proceed under the Interstate Commerce Act would preclude it from later proceeding against Merchants alone as well as against both respondents under the Sherman Act. By said election, petitioner's remedy, if any, against Merchants alone is under the Interstate Commerce Act.

We shall point out in a subsequent section of this brief (pp. 50-57, infra) that the cause of action, if any, arose under the Interstate Commerce Act alone and that all the matters herein complained of were remediable upon proper proofs under that Act. This being so, petitioner was bound to proceed before the Commission under that Act, as it did in the first instance; and it never had a right of action under the Sherman Act against either or both respondents. Consequently, the judgment cannot be reinstated against Merchants alone.

Petitioner next maintains that under the Sherman Act it could have proceeded against Merchants as the sole defendant, naming Railroad as the other conspirator, or it could have dismissed its complaint insofar as Railroad was involved and claimed all of its damages from Mer-

chants as one of two joint tort-feasors (Brief, p. 18). This hypothetical course of action is predicated upon the unsound contention that the Sherman Act provides a cumulative remedy and upon a deliberate disregard of petitioner's election to proceed under the Interstate Commerce Act. As argued above, that election forbids a subsequent action under the Sherman Act against either or both respondents.

It is idle to argue that petitioner might have sued Merchants alone under the Sherman Act, naming Railroad as a co-conspirator, when petitioner has actually brought a joint action against Merchants and Railroad and is even now contending that a joint judgment against them should be reinstated. At the trial, all the evidence produced by petitioner was offered in support of a joint liability and no attempt was ever made to separate that liability. It would be utterly impossible to disentangle petitioner's evidence and say what evidence would be material and relevant in an action against Merchants alone and to what extent the alleged damages could be attributed to the acts of Merchants.

Likewise, having recovered a joint judgment against Merchants and Railroad, it would not be possible at this late stage to reinstate that judgment against Merchants alone without materially prejudicing the cause of Merchants. This Court has repeatedly declared that its broad power to modify a judgment would not be exercised to the prejudice of a defendant; and we submit that to strike off the judgment as to Railroad and allow it to stand as against Merchants would be manifestly prejudicial to the latter. There can be no doubt that the jury in reaching its verdict were greatly influenced by the fact that Railroad is the largest rail carrier and one of the strongest in the United States; nor can there be any uncertainty as to the fact that

the jury in awarding damages took into consideration the proofs of petitioner directed against Railroad alone.

In the leading case of *Washington Gas Light Co. v. Lansden*, 172 U. S. 534 (1889), a libel action was brought against the Washington Gas Light Company and four of its officers. A judgment was obtained in the lower court against the Company and two of its officers. As regards the two other officers, the trial court submitted the case to the jury which made no finding against them—a fact which this Court regarded as a judgment in their favor. On appeal this Court decided that no case was made out against the Company and one of the officers. It was conceded that a case had been made out against the other officer. This Court refused to strike off the judgment as to the Company and one officer and let it stand against the remaining officer because this would be prejudicial to the remaining defendant since the jury in finding damages were no doubt influenced by the financial wealth of the Gas Light Company. The following quotation is from the opinion by Justice Peckham (pp. 555-556):

> "We are also of opinion that even upon the assumption that no error was committed upon the trial as against the defendant Leetch, which in itself would call for a reversal, yet the judgment should be wholly reversed and no judgment entered upon the verdict as to him, because the original verdict was against the three defendants, and it was given under such circumstances that we might well fear the amount was enlarged by the evidence as to the wealth of the corporation, and it is possible, if not probable, that if a verdict had been rendered against the individual defendant alone, it would have been for a materially less amount. At any rate, the jury has never been called upon to render a verdict against a sole defend-

ant, and while it may be said that whether against one or against all the defendants, the plaintiff suffers the same damage and should be entitled to a verdict for the same sum, still the question arises whether a jury, in passing upon the several liability of the individual defendant, would give a verdict of the same amount as it would if both the other defendants remained. We cannot say it would, and as the jury has never rendered a verdict against Mr. Leetch individually and solely, and as the case is one where damages are so largely in the sole discretion of the jury, we think it unjust and improper to permit this verdict to stand against Leetch alone while we set it aside as against the other defendants.

"Where the judgment is based upon a cause of action of such a nature that it might work injustice to one party defendant, if it were to remain intact as against him, while reversed for error as to the other defendants, then we think the power exists in the court, founded upon such fact of possible injustice, to reverse the judgment in toto and grant a new trial in regard to all the defendants."

The principle that this Court will not exercise its power to modify judgments if a defendant or defendants will be prejudiced by striking off the judgment as to other defendants was upheld in *Camp v. Gress,* 250 U. S. 308 (1919) and *James-Dickinson Co. v. Harry,* 273 U. S. 119 (1927), in which cases judgments were modified only because it was apparent that there would be no prejudice in any way to the remaining defendants as to whom the judgments were sustained. A leading lower court decision cited by this Court in the *Washington Gas Light Co.* case (supra) is that of *Albright v. M'Tighe,* 49 Fed. 817 (1892), where the trial court on a motion for a new trial refused to strike off a judgment as to one of three joint defendants saying (pp. 823-824):

"... To invoke the rule of the separate liability of each and every one of several joint tort-feasors for the very first time in the trial of a case upon the motion for a new trial, and to enforce it by a ruling that one may be discharged after verdict against all, and the others held, may be lawful enough under some circumstances; but a court acting impartially towards all parties must feel a sense of its injustice when it appears that neither in the declaration, the pleas, the arguments of counsel, nor the charge of the court were the jury invited to give their consideration to that subject, and that they rendered a verdict supposing, as they might do, that all were to share its burdens, if all were able to do it. It is too much like a verdict by the court than one by the jury to take advantage of these technicalities by refusing two of the defendants a new trial which is given to the other. Another jury will vindicate the plaintiff just as surely as this has done, if the facts and the law entitle him to the vindication he has received at the hands of this jury, whose enforcement of the right of exemption from wrongful arrest and imprisonment is in every way to be commended, and whose verdict is set aside most reluctantly for no fault of theirs. But the court will be better satisfied that such vindication comes from the verdict of a jury, with full knowledge of all the facts, than from a ruling of the court, however technically correct, that imposes upon two a liability the jury intended that three should bear."

In addition to the impossibility of forecasting what verdict the jury might render against Merchants alone as compared with the verdict which it understood and intended should be borne by Merchants and Railroad jointly, there is another reason why the verdict should not be reinstated against Merchants alone. This Court ruled in the case of *Virtue v. Creamery Package Co.*, 227 U. S. 8 (1913) that in a suit under the anti-trust laws a plaintiff, who had

asserted a joint liability against several defendants, could not on appeal shift his ground and assert a separate liability against one defendant as an afterthought. Justice McKenna in delivering the opinion of this Court said (pp. 38-39):

> "But plaintiffs urge that the Creamery Package Manufacturing Company was of itself a combination offensive to the statute and that they were entitled to go to the jury as to that company. But the contention was not made in the Circuit Court nor was it made in the Circuit Court of Appeals. The case was tried and ruled upon, as we have seen, on the ground of the cooperation of the defendants in a scheme of monopoly and restraint of trade. There was no liability asserted in the Circuit Court or in the Circuit Court of Appeals against one of the defendants separately from the others. Concert and cooperation was asserted against all and a ruling was not invoked as to the separate liability of either. One Frank LaBare was a party defendant and as to him plaintiffs made a motion that 'the case be dismissed and dropped'. The court denied the motion for some reason and then plaintiffs' counsel said, 'We desire to proceed with the case as against the defendants, the Owatonna Manufacturing Company and the Creamery Package Manufacturing Company.' The plaintiffs then offered to prove that they had not infringed the patents sued on by the defendants. It is manifest, therefore, that the separate liability of the Creamery Package Manufacturing Company is an afterthought and urged in this court for the first time."

The separate liability of Merchants was not pressed in nor passed upon by the courts below; and, therefore, cannot be raised on this appeal. In refusing to consider a constitutional question not presented in either the District Court or the Circuit Court of Appeals, Mr. Justice Stone stated in the case of *Duignan v. United States, et al.*, 274 U. S. 195 (1927) at page 200:

> ". . . This Court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed."

Practically identical language appears in the earlier opinion of Mr. Justice Stone in *Edward Hines Trustees v. Martin*, 268 U. S. 458 (1925) at page 465 and in the later opinion of Mr. Justice Brandeis in *Van Huffel v. Harkelrode*, 284 U. S. 225 (1931) at page 229, in both of which cases this Court on certiorari refused to entertain points not made in nor discussed by the courts below.

Having commenced a joint action against both respondents and confined its proofs to a joint liability and having admitted in the courts below that recovery in that joint action was barred if the Commission had jurisdiction to award reparation (R. 606), it is too late to assert in this Court for the first time a separate liability against Merchants, especially when petitioner is at the same time maintaining that a joint judgment against Merchants and Railroad should be restored and affirmed.

(b) *The Commission denied reparation because the evidence was inadequate.*

The record of the Interstate Commerce proceeding (160 I. C. C. 563; Defs. Ex. 12; R. 451-522) incontrovertibly discloses that petitioner there argued that the damages claimed flowed directly from Railroad's alleged unlawful contracts with Merchants and the arrangements and practices thereunder; and further that the Commission had full jurisdiction to award reparation for the resultant shrinkage or diminution of petitioner's profits on actual business transactions. This argument appears at length (R. 494-

497) in the Petition for a Further Hearing. Petitioner now repudiates this legal position as a mistake of counsel.

Before the District Court and the Circuit Court of Appeals petitioner maintained that the Commission lacked jurisdiction to award the damages claimed under the subsequent Sherman Act suit since said damages included certain elements not presented to the Commission because they were founded in the conspiracy and not in the violation of the provisions of the Interstate Commerce Act. A vestige of this contention is still found in petitioner's brief before this Court (pp. 19-24) where it is argued that the injury and the damages in the two proceedings are the same but the causes of action are different. We have previously discussed (pp. 18-21, supra) the alleged new matters in the subsequent conspiracy case and shown that the Circuit Court of Appeals correctly held that these matters might have been presented to and passed upon by the Commission, that the failure to do so did not justify their subsequent presentation in the Sherman Act proceeding, and that petitioner was precluded from raising in the Sherman Act proceeding what might have been included in the prior Interstate Commerce proceeding.

For the first time in this Court we find petitioner abandoning both of its prior positions and arguing that the Commission denied reparation because the damages claimed were not directly attributable to any violation by Railroad of the Interstate Commerce Act but were caused by the independent intervening act of Merchants in misusing the payments made to it by Railroad under the several contracts (Brief, pp. 20-24). This reversal of position is obviously an unjustified afterthought. Before the Commission, petitioner stated "the record shows these powerful combinations of carrier and subsidized warehouse ally fix-

ing the market value of warehouse service for the warehouse industry of Philadelphia" (R. 494). One will search in vain through the record before the Commission for any assertion that the sole cause of injury was the intervening act of Merchants.

In the present suit, petitioner has never sought to separate the respondents or their liability and has bottomed its cause of action upon the ground that the evidence proved that petitioner's injury had its source in the contractual arrangements between Merchants and Railroad and that there was direct causal connection between the allowances and the alleged damages. It was never asserted by petitioner in the District Court or in the Circuit Court of Appeals that the intervening act of Merchants was the proximate cause of the alleged injury to petitioner.

In an attempt to gain credence for its new position, petitioner seizes upon part of one sentence in the Report of the Commission, namely, "The evidence is far too vague and indefinite to warrant the conclusion that complainants have suffered actual pecuniary loss *attributable directly* to the alleged unlawful practices"; and, divorcing said words from their context, it seeks to twist out of the words of the Commission a finding that damages had been proved but that they were not attributable to the Railroad. There is, of course, no warrant for such an interpretation. A cursory reading of the Report (R. 477-485) and in particular the paragraph of that Report in which the said words are found (quoted in full at p. 14, supra) will reveal that the finding of the Commission was, on the contrary, that there was not sufficient proof of any damages to warrant a recovery. Reparation was denied because damages must be shown with certainty and petitioner's evidence was far too vague and indefinite to warrant a finding of damage. This

is manifest from the sentences preceding and following the sentence, which petitioner would distort (R. 484-485).

In addition to thus misconstruing the finding of the Commission, petitioner would have it appear that Railroad itself made the same erroneous contention before the Commission. Petitioner quotes disconnected excerpts from Railroad's answer to the Petition for Rehearing which it asserts disclose that Railroad invoked as a reason for the denial of reparation the impossibility of tracing the payments to Merchants into an item of loss to petitioner (Brief, p. 24). Petitioner even charges Railroad with reversing its position before the Commission when it now argues that the Commission had jurisdiction to grant the damages claimed, if proved (Brief, p. 27).

An examination of Railroad's answer (Defs. Ex. 12; R. 500-505) reveals that Railroad took no such position before the Commission. What Railroad argued was that petitioner had not established any right to reparation because its proofs indiscriminately lumped together the so-called "subsidized warehouses" and so far as the evidence went the damages claimed might have resulted equally from the payments made by the Reading or the Baltimore & Ohio Railroad to the Pennsylvania Warehousing and Safe Deposit Company system of warehouses as from the payments to Merchants by Railroad (R. 501-503). In other words, there was no adequate proof that petitioner sustained damage as a result of Railroad's alleged infraction of the Interstate Commerce Act. Railroad by its answer also attacked the failure of the evidence to establish to what extent, if at all, the damages claimed resulted from payments made on account of intrastate as contrasted with interstate shipments. It must be remembered that petitioner's proofs

hopelessly commingled without differentiation the evidence against all three Railroads and on all shipments, whether intrastate or interstate. Railroad's attack upon the sufficiency of petitioner's evidence was not, therefore, based, as is now argued to this Court by petitioner, upon a lack of causal connection between the damages claimed and any alleged infraction by Railroad alone of the Interstate Commerce Act but was founded upon the vagueness, indefiniteness and lack of certainty in petitioner's proofs and the consequent failure of petitioner to establish any right to reparation.

Petitioner's brief (pp. 26-27) contains the statement that petitioner accepted the Commission's decision "as a definite finding that its injuries were not of such a nature as could be the basis of an award by the Interstate Commerce Commission, and considered the finding of the Commission to be a denial of its jurisdiction to award such damages". Petitioner's action after the Commission's denial of reparation was far from this. It immediately filed a Petition for Rehearing in which it pressed its right to present further evidence of damages, maintaining that having established its right to reparation the next step was to show the extent of its damages (Defs. Ex. 12; R. 486-499). In addition to thus renewing its prayer for reparation, made in its original complaint, petitioner filed on August 23, 1930, a new original complaint before the Commission asking reparation for injuries of a like nature suffered during the period intervening after the filing of its first complaint on April 25, 1928 (R. 513-519).

This Court has repeatedly declared that for a violation of the provisions of the Interstate Commerce Act full damages may be recovered and that such damages include everything attributable to the improper practices whether proxi-

mate or remote (pp. 21-27, supra). To stress, therefore, the words "attributable directly" will not help petitioner. Both the Commission and petitioner did not question the fact that lost profits, if shown, could be recovered; but they disagreed as to the degree of proof thereof—the Commission flatly holding that damage must be shown with certainty and not by vague and indefinite evidence (R. 484-485).

Because the Circuit Court of Appeals rightly found that the same damages and the same injury were involved in the Interstate Commerce proceeding and the present Sherman Act suit, petitioner argues that the holding of that court that the Commission had jurisdiction to award said damages is "at variance" not only with the decision of the District Court but also that of the Commission (Brief, p. 26). The logic of this conclusion does not appear in petitioner's brief. The Commission and the Circuit Court of Appeals are in accord in holding that there was jurisdiction under the Interstate Commerce Act to grant the damages claimed, if proved with certainty. The District Court denied this; and, we submit, in so doing fell into error, as pointed out heretofore (pp. 21-27, supra).

B. RESPONDENTS' OTHER ASSIGNMENTS OF ERROR, WHICH WERE NOT CONSIDERED BY THE CIRCUIT COURT OF APPEALS BUT ARE BEFORE THIS COURT, RAISE COMPLETE DEFENSES TO THIS SUIT.

The remainder of this brief will take up in order the further five grounds for reversing the judgment of the District Court, which grounds were assigned as error by respondent, but were not referred to by the Circuit Court of Appeals in its opinion and did not have to be in view of the ground of reversal relied upon by that Court (pp. 12-13,

supra). They are fundamental to petitioner's cause of action, are enumerated in respondents' brief in opposition to the Petition for Certiorari, and are now before this Court as part of the record. They are independent and complete defenses.

1. The cause of action averred by petitioner in this case is under the Interstate Commerce Act and not under the Sherman Act.

The gravamen of petitioner's complaint against respondents centers on the contractual arrangements, under which Merchants' facilities were made a part of Railroad's station facilities and Merchants was paid by Railroad an allowance for handling inbound and outbound freight. Recognizing that any undue preference or discriminatory practices growing out of the contractual arrangements were remediable under the Interstate Commerce Act, petitioner instituted a proceeding before the Commission, which the Circuit Court of Appeals held to be a bar to the present action under the Sherman Act (R. 661-665).

This Court having declared in *Merchants Warehouse Company v. United States, et al.*, 283 U. S. 501 (1931), that the allowances were "illegal rebates" and having affirmed the cease and desist order of the Commission, the Circuit Court of Appeals might well have reversed the judgment upon the ground that the alleged cause of action was solely remediable under the Interstate Commerce Act and that, therefore, no cause of action lay under the Sherman Act. This was raised by the demurrers (R. 94-95) and was pressed in the courts below (Respondents' 1st, 5th, 7th and 30th Assignments of Error; R. 636-638, 646).

The cause of action under the former Act cannot be changed into a right of action under the latter Act, and the

primary and exclusive jurisdiction of the Commission can not be ousted by alleging a conspiracy in connection with the rebates and discriminatory practices. If the law were otherwise, the uniformity of decision provided for under the Interstate Commerce Act in such matters would be destroyed and the undue preference or discrimination complained of would be transferred from the favored shipper to the allegedly disfavored one and magnified by an award of treble damages.

The case of *Keogh v. C. & N. W. Ry. Co.*, 260 U. S. 156 (1922), is a strong authority for the proposition that a cause of action such as is here sought to be presented arises under the Interstate Commerce Act and not under the Sherman Act. In that case recovery was sought on the theory that, although the rates established were reasonable rates and did not violate the standards of the Interstate Commerce Act, the plaintiffs were entitled to competitive rates, and the railroads, by agreeing among themselves as to what the rates should be, had been guilty of a conspiracy in restraint of interstate trade and could be held liable under the Sherman Act. This Court held that Congress did not intend to provide the shipper with an additional remedy of this kind under the Anti-trust Act. The rates in question had been approved by the Interstate Commerce Commission, but, at page 162 of the opinion, Mr. Justice Brandeis says:

> "A rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade in violation of the Anti-Trust Act. What rates are legal is determined by the Act to Regulate Commerce. Under Section 8 of the latter act the exaction of any illegal rate makes the carrier liable to the 'person injured thereby for the full amount of damages sustained in

consequence of any such violation' together with a reasonable attorney's fee. Sections 9 and 16 provide for the recovery of such damages either by complaint before the Commission or by an action in a federal court. If the conspiracy here complained of had resulted in rates which the Commission found to be illegal because unreasonably high or discriminatory, the full amount of the damages sustained, whatever their nature, would have been recoverable in such proceedings. *Louisville & Nashville R. R. Co. v. Ohio Valley Tie Co.*, 242 U. S. 288. Can it be that Congress intended to provide the shipper, from whom illegal rates have been exacted, with an additional remedy under the Anti-Trust Act? See *Meeker v. Lehigh Valley R. R. Co.*, 162 Fed. 354. And if no remedy under the Anti-Trust Law is given where the injury results from the fixing of rates which are illegal, because too high or discriminatory, may it be assumed that Congress intended to give such a remedy where, as here, the rates complained of have been found by the Commission to be legal and while in force had to be collected by the carrier?"

As will be observed, the context definitely indicates the view of this Court (and the Court was unanimous) that the facts set up disclosed no infraction of the Anti-trust Act and would not have disclosed any such infraction even if, by the conspiracy, the railroads had put in effect illegal rates, since the damages therefor would have been recoverable before the Commission.

And the opinion discloses, among others, a very significant reason for this holding. After referring to the way in which rates are established, this Court says (p. 163):

"This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated. If a shipper

could recover under Section 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors. It is no answer to say that each of these might bring a similar action under Section 7. Uniform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief. Compare *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 440."

As will be observed, this Court cites the leading decision, *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, which is the foundation of the exclusive jurisdiction of the Interstate Commerce Commission in matters of this kind and which develops clearly and in detail the absolute necessity for uniformity in regulation if the objectives of the Interstate Commerce Act are to be maintained. In other words, in the *Keogh* case one shipper, if allowed to recover under the Sherman Act by an allegation of conspiracy, etc., might receive preferential treatment as against another shipper.

Precisely the same thing might happen if a shipper (and this Court has treated petitioner as a shipper, 283 U. S. 501) were permitted to recover damages for undue preference by a jury verdict without preliminary action by the Commission establishing the precise rule for the ascertainment of his damages. As the decisions have indicated, the Commission's jurisdiction in determining whether there is undue preference or undue discrimination is exclusive: *B. & O. R. R. Co. v. United States*, 215 U. S. 481 (1910); *Interstate Commerce Commission v. Illinois Central R. R. Co.*, 215 U. S. 452 (1910); *Robinson v. B. & O. R. R. Co.*,

222 U. S. 506 (1912); *Morrisdale Coal Co. v. Penna. R. R.*, 230 U. S. 304 (1912).

When undue preference or undue discrimination is ascertained, the Interstate Commerce Commission not only so finds, but lays down the rule for the elimination of this undue preference or undue discrimination, and, in appropriate cases where damages are proved, awards such damages, as will establish a proper balance between the shipper preferred and the shipper discriminated against. It is readily apparent that, if the ascertainment of damages were left to juries, it might well be that a jury, seeking to restore the balance between two shippers, might tip the scales too far in the direction of the disfavored shipper so as to make him, in the final result, as much, or even more, preferred as the shipper to whom he contended preference had been shown in the past. This is not idle speculation of counsel because there is now awaiting trial in the District Court of the United States for the Eastern District of Pennsylvania a parallel case brought by another Philadelphia Warehouse Company against respondents to recover treble damages under the Sherman Act. The caption of that case is *Walter A. Bailey, trading as Bailey Warehouses v. Pennsylvania Railroad Company,* and *Merchants Warehouse Company,* March Term 1932, No. 16,772.

Moreover, a preference to one shipper may constitute a disadvantage to two or more different shippers, and if juries are allowed to assess damages, the assessment is just as likely to be unfair and discriminatory as between the shippers subjected to the discrimination as awards of damage on account of unreasonable rates are likely to result in a lack of uniformity as between the shippers seeking recovery. The theory that the Interstate Commerce Commission must have and retain exclusive jurisdiction in matters

of this kind is precisely the same and precisely as important as in those cases which involve jurisdiction over the level of rates.

That the Sherman Act may not be invoked by a shipper complaining of an alleged infraction of the Interstate Commerce Act, because this would destroy uniformity of decision and would result in a preference in his favor, is equally clear from this Court's decision in *Pennsylvania R. R. Co. v. International Coal Co.*, 230 U. S. 184 (1913) (supra). There a shipper sued the railroad to recover as damages the rebates paid to a competitor. In denying such damages, Justice Lamar said (pages 204-205):

> "Or, to take another example—a favored dealer may have shipped 10,000 tons of coal to the open New York market, receiving thereon a rebate of 35 cents a ton, or $3,500. The plaintiff at the same time may have shipped 20,000 tons and sold the same at the regular market price. Under the rule contended for it would then be entitled to 35 cents a ton on 20,000 tons, or $7,000 as damages. Such a verdict, instead of compensating it for losses sustained, would have given to the plaintiff a profit on the carrier's crime in paying a rebate of $3,500 and would have made it an advantage to it instead of an injury for the carrier to violate the law."

Another case in point is *United States Navigation Co. v. Cunard S. S. Co.*, 284 U. S. 474 (1932), in which case the bill charged an unlawful combination and conspiracy to exclude the plaintiff from the business of carrying general cargo between the United States and certain foreign countries and to monopolize the same for certain of plaintiff's competitors. The means alleged included the coercion of shippers by charging much higher rates to those shippers who did not agree to use defendant's lines exclusively, the

giving of rebates and the threats to blacklist forwarders making shipments in plaintiff's ships. In affirming the decree of dismissal, Mr. Justice Sutherland said (pp. 485-486):

> "A comparison of the enumeration of wrongs charged in the bill with the provisions of the sections of the Shipping Act above outlined conclusively shows, without going into detail, that the allegations either constitute direct and basic charges of violations of these provisions or are so interrelated with such charges as to be in effect a component part of them; *and the remedy is that afforded by the Shipping Act, which to that extent supersedes the anti-trust laws.* Compare Keogh v. Chicago & N. W. Ry. Co., supra, at p. 162. The matter, therefore, is within the exclusive preliminary jurisdiction of the Shipping Board. The scope and evident purpose of the Shipping Act, as in the case of the Interstate Commerce Act, are demonstrative of this conclusion. (Italics supplied.)

To the same effect is *Glenn Coal Co. v. Dickinson Fuel Co., et al.*, 72 Fed. (2d) 885 (1934) (C. C. A. 4), *supra*, with its specific holding that recovery of damages under the Sherman Act for an alleged illegal registration of a trade-mark was barred by the existence of an adequate remedy under the trade-mark laws.

In an attempt to differentiate the present action under the Sherman Act from the prior Interstate Commerce proceeding, petitioner relied on certain factual issues over which the Commission had administrative as well as judicial jurisdiction. It has already been pointed out that these issues were before the Commission and were disposed of by its "cease and desist" order (pp. 18-21, supra). Moreover, even if these issues had not been before the Commission, petitioner would be precluded from now raising them,

because as held by this Court in *L. & N. R. R. v. Ohio Valley Tie Co.*, 242 U. S. 288, 291 (1916), they might have been the basis of recovery before the Commission under the challenge of the arrangement between Railroad and Merchants as a violation of Sections 2 and 3 of the Interstate Commerce Act and of the Elkins Act (49 U. S. C. A. 41-43).

These factual issues must be presented, if at all, to the Commission, since they fall within Sections 2 and 3 of the Interstate Commerce Act and therefore lie within the Commission's exclusive jurisdiction. They are founded upon (a) the solicitation by Railroad of business through pamphlets advertising various warehouses including those of Merchants, (b) the side-track agreements between Railroad and Merchants and (c) Merchants' freedom from demurrage (Pl. Exs. 3, 4, 5, 6, 14, 19 and 20; R. 155-157, 186, 247), all of which issues, as above stated (pp. 18-21, supra), were dealt with by the Commission and fell within the purview of the cease and desist order (Defs. Ex. 12; R. 476-485).

2. Merchants' general warehousing business in Philadelphia is not interstate commerce.

The general warehousing business conducted in Philadelphia by Merchants, by petitioner and by their many rival and competing warehouse systems is purely local and intrastate and is not commerce within the meaning of the Constitution. This defense was first raised by the demurrers and is covered by several assignments of error in the Circuit Court of Appeals (Respondents' 2d, 3d, 5th, 6th, 17th, 22d, 23d and 24th Assignments of Error; R. 637, 638, 640, 644). The local and intrastate character of the business will be discussed; and then the scope of that business, which consists in the handling and storage of goods, but involves no intercourse or traffic.

Patently, the Sherman Act cannot be applied to that business, which alone is involved in this case. The alleged conspiracy to monopolize the complementary transportation services, as to which no evidence was offered by petitioner, could not have been the proximate or direct cause of any injury averred to have been suffered by it. This will be fully shown hereafter (pp. 70-72, infra).

(a) *General warehousing business is local, not interstate.*

The trial Court charged the jury as follows (R. 533):

> "I have been asked to say to you that there is no evidence of interstate commerce in this case. I decline to say that to you. There is evidence in this case from which you may find that the business with which we are here concerned, the trade with which we are here concerned, the commerce with which we are here concerned, was *in some measure, and, indeed, in large measure,* interstate commerce. Therefore, the laws to which I will call your attention in a moment have application to it." (Italics supplied.)

In so charging, the trial court evidently had in mind the fact that goods handled by the warehouses in Philadelphia have been before their receipt and may become in the future subjects of interstate commerce.

It is submitted, however, that the handling of goods in Philadelphia by the warehouses is separate from the transportation of, and from any interstate aspect of the commerce in, such goods; that the warehousing business is purely local and intrastate.

Petitioner's witness, Ernest V. D. Sullivan, gave a detailed description of the business (R. 175-177, 179-183). The warehouse company acts as agent for shippers and con-

signees, to receive goods from the railroad, to deliver them to the railroad, and to perform incidental services. With respect to incoming shipments, the services consist of unloading cars of freight after their arrival at the side-tracks of the warehouse company, sorting the contents, reporting any breakage, recoopering where necessary, etc., and either delivering the goods so received, or a portion of them, to the consignee, or upon his order, at the truck platform of the warehouse, or putting them in storage. With respect to goods which are to be shipped out of the city by rail, the warehouse services consist of receiving the goods from the shipper, or upon his direction, taking goods which are already in storage, loading them on to freight cars, and making out a bill of lading. All these services can be briefly described as handling and storage.

This Court has already decided that these services were not a part of transportation, *Merchants Warehouse Co. v. United States,* 283 U. S. 501 (1931), at 509-10, affirming *Gallagher v. Pennsylvania Railroad Company,* 160 I. C. C. 563 (1929), and *Merchants Warehouse Company v. United States,* 44 Fed. (2d) 379 (1930), and petitioner concedes this point. Statement of Claim, par. 11 (R. 11). The question is simply whether such warehousing, considered by itself, is interstate commerce.

The case under the Sherman Act which is most closely in point, is the leading one of *Hopkins v. United States,* 171 U. S. 578 (1898). In that case, the court held that the business of commission merchants, who acted for the owners of cattle coming into the Kansas City Stock Yards, in arranging for the disposition and sale of the cattle, and in handling and caring for the stock upon its arrival at the yards, was not interstate commerce.

We quote from the opinion in the *Hopkins* case in order to emphasize the distinction there laid down between interstate and intrastate transactions, (171 U. S. at page 587):

> "We come, therefore, to the inquiry as to the nature of the business or occupation that the defendants are engaged in. Is it interstate commerce in the sense of that word as it has been used and understood in the decisions of this Court? *Or is it a business which is an aid or facility to commerce, and which, if it affect interstate commerce at all, does so only in an indirect and incidental manner?*"

(171 U. S. at page 591):

> "The charges of the agent on account of his services are nothing more than charges for aids or facilities furnished the owner whereby his object may be the more easily and readily accomplished. Charges for the transportation of cattle between different States are charges for doing something which is one of the forms and which itself constitutes interstate trade or commerce, while charges or commissions based upon services performed for the owner in effecting the sale of the cattle *are not directly connected with, as forming part of,* interstate commerce, although the cattle may have come from another State." (Italics supplied.)

The storage and handling of goods in the warehouses of Merchants and petitioner is similar to the intrastate handling of poultry in New York slaughterhouses, of which this Court said in *Schechter Poultry Corporation v. United States,* 295 U. S. 495 (1935) at pages 542-543:

> "Were these transactions 'in' interstate commerce? Much is made of the fact that almost all the poultry coming to New York is sent there from other states. . . . When defendants had made their purchases,

whether at the West Washington Market in New York City or at the railroad terminals serving the city, or elsewhere, the poultry was trucked to their slaughterhouses in Brooklyn for local disposition. The interstate transactions in relation to that poultry then ended. Defendants held the poultry at their slaughterhouse markets for slaughter and local sale to retail dealers and butchers who in turn sold directly to consumers. Neither the slaughtering nor the sales by defendants were transactions in interstate commerce. Brown v. Houston, 114 U. S. 622, 632, 633, 5 S. Ct. 1091, 29 L. Ed. 257; Public Utilities Commission v. Landon, 249 U. S. 236, 245, 39 S. Ct. 268, 63 L. Ed. 577; Industrial Association v. United States, 268 U. S. 64, 78 79, 45 S. Ct. 403, 69 L. Ed. 849; Atlantic Coast Line R. Co. v. Standard Oil Co., 275 U. S. 257, 267, 48 S. Ct. 107, 72 L. Ed. 270."

The distinction between local and interstate transactions appears clearly in decisions under the Employers Liability Act of April 22, 1908, c. 149 sec. 1, 35 Stat. 65 (45 U. S. C. A. 51). In decisions under that Act it has been established that when a loaded car, which has moved from another state, is delivered at the private yards of the consignee, the interstate part of the movement has terminated, and the subsequent yard movement of the car for the purpose of placing it for unloading, even though performed by the carrier, and the unloading of the car, are local services, not a part of such commerce. Similarly the loading of a car in a private yard, and the movement incident thereto is not a part of interstate commerce. This is precisely the situation presented here, and the same conclusion must be reached. *Chicago B. & Q. R. Co. v. Harrington*, 241 U. S. 177 (1916); *Lehigh Valley R. Co. v. Barlow*, 244 U. S. 183 (1917); *Geraghty v. Lehigh Valley R. Co.*, 70 Fed. (2d) 300

(1934) (C. C. A. 2d); *Schauffele v. Director General*, 276 Fed. 115 (1921) (C. C. A. 3d). See also *McCluskey v. Marysville & Northern Railway Company*, 243 U. S. 36 (1917).

Similarly, under the Interstate Commerce Act the shipment of oil from Mexico to Florida was held to have terminated when the oil was piped from the tankers into large storage tanks at the port, notwithstanding the fact that the oil was destined for distribution in the interior of the state, with the result that the *state* freight rates and *not interstate* rates, applied to the shipment of the oil from the storage tanks to the points in the interior. *Atlantic Coast Line Railroad Co. v. Standard Oil Co. of Kentucky*, 275 U. S. 257 (1927).

In line with these decisions are the cases testing the right of a state to tax goods which have come to rest within its borders, when the goods have been brought from outside the limits of the state or are soon to be shipped in interstate commerce. It has uniformly been held that such goods are subject to state taxation. *Brown v. Houston*, 114 U. S. 622 (1885); *Coe v. Errol*, 116 U. S. 517 (1886); *Minnesota v. Blasius*, 290 U. S. 1 (1933); *Federal Compress & Warehouse Co. v. McLean*, 291 U. S. 17 (1934).

In *Minnesota v. Blasius*, 290 U. S. 1 (1933) (supra) this Court said, at pages 8 and 10:

> "The States may not impose direct burdens upon interstate commerce, that is, they may not regulate or restrain that which from its nature should be under the control of the one authority and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains. This limitation applies to the exertion of the State's taxing power as well

as to any other interference by the State with the essential freedom of interstate commerce. Thus, the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it. Similarly, the States may not tax property in transit in interstate commerce. But, by reason of a break in the transit, the property may come to rest within a State and become subject to the power of the State to impose a nondiscriminatory property tax. Such an exertion of state power belongs to that class of cases in which, by virtue of the nature and importance of local concerns, the State may act until Congress, if it has paramount authority over the subject, substitutes its own regulation. *The 'crucial question,' in determining whether the State's taxing power may thus be exerted, is that of 'continuity of transit.'* Carson Petroleum Co. v. Vial, 279 U. S. 95, 101." (Italics supplied.)

. . . . . .

"Where property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the State, or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general mass of property within the State and is thus subject to its taxing power."

In the present case, the goods, while in the warehouses, are at rest, and a part of the general mass of property in the state. If the ultimate sale of these goods brings them again into the flow of interstate commerce, it cannot be said that the local storage and handling done in the warehouses is any part of such commerce.

The attention of this Court is particularly directed to the case of *Federal Compress & Warehouse Co. v. McLean,*

291 U. S. 17 (1934) (supra), in which a state tax on cotton in a warehouse doing a business very similar to that of the warehouses here, was upheld as *not* being a tax upon interstate commerce. The warehouse had an agreement with a railroad company under which the warehouse was designated as the agent of the railroad to receive cotton from and deliver it to the railroad, and to load and unload cars. The ordinary course of business was for the railroad to pay the warehouse charges, and to add these to the charge for carriage. In the case of cotton brought to the warehouse by rail and subsequently shipped out by rail, the through interstate rate was applied from the point of origin to the ultimate destination. This Court nevertheless held that the cotton was at rest in the state while at the warehouse, and was not in interstate commerce. We quote from the opinion (291 U. S. at page 21):

> "It is clear that by all accepted tests the cotton, while in appellant's warehouse, has not begun to move in interstate commerce, and hence is not a subject of interstate commerce immune from local taxation. When it comes to rest there, its intrastate journey, whether by truck or by rail, comes to an end, and, although in the ordinary course of business the cotton would ultimately reach points outside the state, its journey interstate does not begin and so it does not become exempt from local tax until its shipment to points of destination outside the state. Before shipping orders are given, it has no ascertainable destination without the state, and in the meantime, until surrender of the warehouse receipts, it is subject to the exclusive control of the owner. Property thus withdrawn from transportation, whether intrastate or interstate, until restored to a transportation movement interstate, has often been held to be subject to local taxation. Coe v. Errol, 116 U. S. 517;

Bacon v. Illinois, 227 U. S. 504; General Oil Co. v. Crain, 209 U. S. 211; Susquehanna Coal Company v. South Amboy, 228 U. S. 665, 669; State of Minnesota v. Blasius, 290 U. S. 1; cf. Arkadelphia Milling Co. v. St. Louis Southwestern R. Co., 249 U. S. 134."

And again (291 U. S. at page 22):

"The fact that appellant's contract with the interstate rail carrier has designated appellant as the carrier's agent and appellant's warehouse as the carrier's depot cannot alter the legal consequences of what is actually done with the cotton by its owners or of their power of control over it, or of the actual course of dealing with it by appellant. *It is not within the power of the parties, by the descriptive terms of their contract, to convert a local business into an interstate commerce business protected by the interstate commerce clause.* See Merchants Warehouse Company v. United States, 283 U. S. 501, 507, 508; Superior Oil Co. v. Mississippi, 280 U. S. 390; Browning v. Waycross, 233 U. S. 16, 23." (Italics supplied.)

The citation by this Court of *Merchants Warehouse Company v. United States*, 283 U. S. 501 (1931) (supra) in support of its decision that the warehouse company was doing a "*local business*", as distinguished from "an interstate commerce business", clearly indicates the interpretation given by this Court to its own decision relating to the very business here under discussion.

The interstate transportation was entirely concluded when the delivery was made by Railroad to Merchants and had not begun in the case of those shipments delivered by Merchants to Railroad until the storage service had ended. This determination by this Court of the relation between Merchants and Railroad is a clear demarcation of the point at which the interstate character of service begins and ends,

and obviously does not include storage service either on outbound or inbound shipments, and this is of course equally true of the business of petitioner and the other competing warehouse systems.

It is submitted that the District Court erred in overruling respondents' affidavits of defense in the nature of demurrers (R. 103), and subsequently, when detailed evidence of the nature of the warehousing business was introduced, in failing to direct a verdict for respondents, on the ground that the warehousing business alleged to have been monopolized and restrained is local and not interstate, and that petitioner therefore had no cause of action under the Sherman Act (R. 640, 644).

(b) *General warehousing business is not commerce.*

The business of the general warehousing companies as carried on in Philadelphia, is not only a purely local one having no part in interstate commerce, but it is not *commerce.*

Definitions of "commerce" appear in many cases. The most frequently quoted was given by Chief Justice Marshall, in writing the opinion of this Court in *Gibbons v. Ogden,* 9 Wheaton 1 at page 189 (1824):

> "The counsel for the appellee would limit it (commerce) to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse."

This definition has been often restated in subsequent decisions, and the basic principles therein laid down have

not been changed. The applications of this definition to concrete transactions throw light upon the question here presented. Thus, the flow of oil and natural gas in pipe lines, the floating of logs down streams, the driving of cattle or sheep to market, the sending of messages and transmission of electricity over wires, contracts for the purchase, sale or exchange of goods—all have been held to be commerce.

But manufacture, the ginning of cotton, the refining of sugar, mining, generating electricity, insurance, advertising, organized baseball and the hiring of laborers have all been held by this Court not to be commerce:

Kidd v. Pearson, 128 U. S. 1 (1888);
Hammer v. Dagenhart, 247 U. S. 251 (1918);
United Leather Workers v. Herkert & Meisel Trunk Co., 265 U. S. 457 (1924);
Crescent Cotton Oil Co. v. Mississippi, 257 U. S. 129 (1921);
United States v. E. C. Knight Co., 156 U. S. 1 (1895);
D. L. & W. R. R. Co. v. Yurkonis, 238 U. S. 439 (1915);
Utah Power and Light Co. v. Pfost, 286 U. S. 165 (1932); 52 Sup. Ct. Rep. 548.
Paul v. Virginia, 8 Wallace 168 (1869);
Hooper v. California, 155 U. S. 648 (1895);
N. Y. Life Insurance Co. v. Deer Lodge County, 231 U. S. 495 (1913);
Bothwell v. Buckbee Mears Co., 275 U. S. 274 (1927).
Blumenstock Bros. Adv. Agency v. Curtis Publishing Co., 252 U. S. 436 (1920).

Federal Baseball Club v. National League, 259 U. S. 200 (1922).

Williams v. Fears, 179 U. S. 270 (1900).

In *Nathan v. Louisiana*, 8 Howard 73 (1850), a tax on money and exchange brokers who dealt in the purchase and sale of foreign bills of exchange was sustained as not conflicting with the constitutional power of Congress. This Court said, at page 81, that the individual thus using his money "is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the shipbuilder, without whose labor foreign commerce could not be carried on."

No case has been found, and it is believed that none exists in which the performance of services, corresponding to the warehouse services here, has been held to be commerce. On the contrary, cases involving a consideration of similar businesses have uniformly held them not to come within the meaning of "commerce" as used in the constitution. *Hopkins v. United States*, 171 U. S. 578 (1898) (supra).

In *United States v. Moore*, 275 Fed. 992 (1920), an association of steamship brokers entered into an agreement with a number of steamship lines, under which brokerage fees were to be allowed by the lines only to brokers who were members of the association. The brokers were not agents of the steamship lines but acted in each case for the shipper. It was charged that this violated the Sherman Act and all parties to the agreement were indicted. In sustaining the demurrer to the indictment, the Court said, at page 995:

> "There is no allegation that the steamship company has refused freight from any source or at a

different rate, whether from the shipper direct or from a person not a member of the Steamship Freight Brokers' Association. The sole allegation, in effect, is that no agent of a shipper, other than a member of the Steamship Freight Brokers' Association has received or will receive a brokerage fee. In order to sustain this count of the indictment it must appear that the business in which the members of the Steamship Freight Brokers' Association are engaged constitutes interstate trade or commerce. That it does not would seem to be apparent without a citation of authority."

On the same page the Court says:

> "Brokerage, by whomsoever paid, is merely an aid or facility whereby shipment may be more easily and readily accomplished. It is in no sense interstate or foreign trade or commerce."

The facts of the *Moore* case are strikingly like those of the present case. The steamship companies paid brokerage fees only to certain of the brokers who dealt with them, just as here Railroad has made certain payments to Merchants under its contracts. In the absence of any allegation, in the *Moore* case, that the shipment of goods had been interfered with, the demurrer was sustained. Similarly in the present case there is no such allegation or proof. The demurrer here should have been sustained, and, subsequently, a verdict for respondents directed, for the same reason.

(c) *Local warehousing business not being interstate commerce, the Sherman Act has no application to it.*

Once it be determined that the general warehousing business conducted by Merchants in Philadelphia is a local, intrastate business and is not commerce, it inevitably fol-

lows that the Sherman Act cannot be applied to it. To do so would be violative of the Constitution. Ever since its passage on July 2, 1890, the Sherman Act has been uniformly construed as a statute applicable solely to interstate commerce; and we have found no case in which it was attempted to apply its statutory provisions to a business that did not fall within the category of interstate commerce. Under Article 1, Section 8, Clause 3 of the United States Constitution, the Congress was granted power to regulate interstate commerce; and the constitutionality of the Sherman Act depends upon confining its purpose and scope to interstate commerce. To extend it to a business which is neither interstate nor commerce would make it unconstitutional. No citation of authorities is necessary for this horn book principle of constitutional law.

The present suit is founded upon the contention that the local Philadelphia warehousing business of Merchants and petitioner is interstate commerce; and its submission to a jury to determine petitioner's alleged damages is predicated upon the finding by the trial Judge as a matter of law that the business of Merchants was interstate commerce (R. 533). Had the trial Judge found otherwise, he would have been obliged to sustain the demurrers or else direct a verdict for respondents. A finding by this Court that a local warehousing business is not interstate commerce must lead to the dismissal of the present suit, because the Sherman Act can only apply to a cause of action involving interstate commerce.

Petitioner's assertion here that, conceding the general warehousing business in Philadelphia to be intrastate, nevertheless the complementary transportation was interstate commerce which had been restrained by a combination between respondents, is no more than a belated attempt to

avoid the above conclusion. It is true that petitioner averred in Paragraph 8 of its Statement of Claim that the purpose of the alleged conspiracy between respondents was not only to destroy petitioner's warehousing business and secure a monopoly for Merchants of the general warehousing business in Philadelphia, but also to secure for Railroad a monopoly of the complementary transportation. However, at the trial petitioner abandoned its position with respect to transportation, since it offered no evidence of any kind concerning the carriage of warehouse goods. The only evidence relating to transportation was introduced by respondents (Defs. Ex. 6; R. 443). This was a tonnage schedule showing the warehouse traffic carried into and out of Philadelphia by the Pennsylvania Railroad, the Reading and the Baltimore & Ohio, being the only roads serving that City. The schedule showed that although from 1927 to 1932, inclusive, the amount of warehouse freight carried by all roads decreased materially, the loss of traffic over the Pennsylvania Railroad was far greater than that over the other two roads, so that having at the beginning of that period carried more of such freight than the other two lines, the Pennsylvania Railroad, by 1931, was carrying less than the other two.

This clearly establishes that the Pennsylvania Railroad had no monopoly of the complementary transportation business. The evidence as to monopoly and conspiracy will be fully discussed in the succeeding section of this brief and is mentioned here merely to show that the question of monopoly or restraint of transportation is not an issue in this case. No reference thereto was made by petitioner's counsel in his closing speech to the jury nor by the trial judge in his charge. The only question considered at that time was

monopoly and restraint of the warehousing business. It is submitted that on these proofs petitioner cannot now insert interstate transportation into this case in order to bring this case within the Sherman Act.

Certainly the establishment by the Railroad of additional delivery points or advantageous terminal facilities to shippers and receivers of freight in Philadelphia cannot be said to constitute a restraint of trade, and it should be noted in this connection that the evidence shows (R. 251-258; 283) that the Reading Railroad and the Baltimore & Ohio Railroad met any competition thus resulting by establishing similar arrangements with other warehouses.

Moreover, a monopoly or restraint of transportation could not be the proximate cause of any injury to petitioner, so that in no event could petitioner recover in this action. *Swift and Company v. United States* and similar cases cited in petitioner's brief (p. 32) have no bearing. The United States Government may, of course, enjoin a combination which restrains or tends to restrain interstate commerce. But a civil action for damages is given to private individuals only when their injury results from a restraint of such commerce. Petitioner did not prove, and clearly could not even suggest that it had been injured in any way by any restraint put upon transportation. On the contrary, it asserts that it has been damaged by an alleged monopoly of the general warehousing business. This, as has been shown above, is not a part of interstate commerce and the conclusion is inescapable that petitioner has no cause of action under the Sherman Act.

3. Respondents have in no way violated the Sherman Act.

Paragraph 8 of petitioner's statement of claim charges respondents with having combined and conspired to monopolize and restrain interstate commerce by (a) rendering unprofitable and destroying the business of petitioner and other competing warehouse companies in Philadelphia, (b) gaining a monopoly for Merchants of Philadelphia's warehousing business, and (c) gaining a monopoly for Railroad of the complementary transportation services (R. 10). The proofs, however, failed to show any combination or conspiracy either in restraint of the warehousing business in Philadelphia and the complementary transportation services or in monopoly thereof. On the contrary, the evidence disclosed that the warehousing business of petitioner had abnormally expanded, largely at the expense of Merchants, thereby establishing that there was no monopoly of Philadelphia's warehousing business by Merchants. The breakdown in petitioner's proof of the charge of conspiracy and monopoly is covered by Respondents' Assignments of Error, Nos. 2, 3, 5, 6, 16, 19, 20, 25-29 and 41; R. 637-638, 640-645.

Under this heading, we will first take up the absence of proof of a conspiracy, next the lack of evidence of a monopoly and lastly the failure to show any restraint.

(a) *There was no combination or conspiracy between respondents within the Sherman Act.*

Merchants was the first company in Philadelphia to engage in the type of business here involved, having been organized in 1886 for that purpose (R. 251-252, 258-260). That year the Market Street tracks of Railroad were elevated, thus cutting off the sidings that

led into the many private flour warehouses along Market Street (R. 251-258). To provide a warehouse for the flour merchants, Merchants was organized, and Railroad leased to it a building in its yards at Eighteenth and Market Streets, under terms substantially the same as those of all the succeeding contracts which were in effect up to May, 1931, (R. 259; Pl. Ex. 1, R. 18-93; Defs. Ex. 1, R. 411). Railroad considered this to be an improvement of its facilities, and took a part in the organization of Merchants.

In 1897 a warehouse was built by Pennsylvania Warehousing and Safe Deposit Company adjacent to the yards of Reading Company, and an agreement for loading and unloading was entered between those companies of the same sort as the agreement between Railroad and Merchants. The Baltimore and Ohio Railroad at about the same time made similar contracts with the Pennsylvania Warehousing and Safe Deposit Company (R. 252, 283; Defs. Exs. 3, 4, 13; R. 416, 429, 387). Thereafter that Company and Merchants were in competition. The business was good, and both companies grew. As new buildings were added, similar agreements were made with the respective railroad companies covering the handling of freight. Petitioner was organized in 1904 and other warehouse companies came into the business so that there are now about ten, (R. 202, 209, 262) but no contracts were made with them by the railroads.

The contracts between Railroad and Merchants have already been the subject of consideration by the statutory court in the third circuit, in the case of *Merchants Warehouse Co. v. United States*, 44 Fed. (2d) 379, 381, (1930), and also by this Court in the same case in 283 U. S. 501 (1931).

There were nine separate contracts, almost identical in their terms, each of which related specifically to the

handling and storage of goods at a different warehouse of Merchants. Five of them, namely, the contracts executed in 1916 and 1918 (R. 18-58, 68-75), were leases made by Railroad to Merchants of warehouses situated in Railroad's yards and the other four were agreements between the companies with reference to warehouses already in the possession of Merchants (R. 59-67, 76-93).

At the time the contracts were made the parties thereto intended to constitute Merchants the agent of Railroad, for the performance of certain terminal services; and the warehouses of Merchants were regarded as station facilities of the railroad. There is no question of the honesty or good faith of either company in holding this belief. The testimony in this regard of respondents' witnesses Julien L. Eysmans (R. 290-304) and George M. Richardson (R. 273), is wholly uncontradicted. The officers of the Reading Company and the Baltimore & Ohio Railroad, and of the Pennsylvania Warehousing and Safe Deposit Company likewise considered that the contracts between those companies which were like those here involved, were contracts of agency, and that the warehouses there concerned were station facilities of those railroads. (R. 282-290, 320-327, 337, 370.)

The parties, moreover, had good reason to believe that this was the legal effect of their contracts. The Federal Government, when it was operating the railroads during the war period, actually *increased* the amount of the payments made to Merchants by Railroad, (R. 291-298); and this increase was ordered *over the opposition* of Railroad's officers. The inspectors of the Interstate Commerce Commission were thoroughly familiar with the whole arrangement, but the Commission at no time made any objection to it, until they finally declared it to be illegal under the Inter-

state Commerce Act, as involving the giving of rebates, in *Gallagher v. Pennsylvania Railroad Company*, 160 I. C. C. 563 (1929). (R. 298.) In so deciding the Commission overruled a series of earlier decisions in which similar contracts between Railroad and other warehouse companies were sustained and enforced on the ground that they were contracts of agency. These decisions are:

Keystone Warehouse Company v. Pennsylvania Railroad Co. and Director General, 53 I. C. C. 335, decided in 1919. The Keystone Warehouse Company of Buffalo recovered from Railroad the amount of demurrage which Railroad had collected from it. Warehouse was under a contract almost identical to the contract with Merchants, and the Commission held that this constituted the warehouse company the agent of Railroad, and that therefore no demurrage was chargeable for the detention of cars.

Keystone Elevator and Warehouse Company v. Director General and Pennsylvania Railroad Co., 73 I. C. C. 273, decided in 1922. The warehouse company was under a contract with Railroad similar to the contracts here in question, except that after the expiration of the contract it was not immediately renewed, the warehouse continuing to perform the same services during the interval upon an understanding that it would receive reasonable compensation. The Interstate Commerce Commission held that the warehouse was entitled to receive compensation that would give it a profit.

To the same effect is *Pennsylvania Railroad Co. v. Keystone Elevator and Warehouse Company*, 237 U. S. 432 (1915), affirming 246 Pa. 336.

McCormick Warehouse Company v. Pennsylvania Railroad Company, 95 I. C. C. 301, decided in 1925. The

Terminal Warehouse Company of Baltimore was under a contract with Railroad similar to the contracts here in question. Other warehouses complained that this arrangement was discriminatory and violated the Interstate Commeree Act. The Commission held, however, that there was no violation, because the warehouse was the agent of Railroad.

Despite having thus consistently ruled for many years that an arrangement identical to that existing between the respondents was not discriminatory and did not violate the Interstate Commerce Act, the Commission was finally induced to reverse its position and to hold that the warehouse was not the agent of the carrier and consequently that the arrangement was discriminatory and violative of the Interstate Commerce Act. This reversal of position took place in a rehearing of the *McCormick Warehouse case,* supra, reported in 148 I. C. C. 299, decided in 1928. This change in the Commission's ruling immediately gave rise to the litigation out of which grows the present suit.

Thus there was ample basis for respondents' belief that their relationship was that of principal and agent. This is established by the lack of unanimity among the judges of the statutory court in this Circuit, which affirmed the Commission's finding that there was no agency, *Merchants Warehouse Company v. United States,* 44 Fed. (2d) 379 (1930), and by the statement of this Court in finally affirming the decision. *Merchants Warehouse Company v. United States,* 283 U. S. 501 (1931), at 513, 514.

The conduct of the parties in carrying out their agreements is entirely consistent with their understanding of their relationship. Thus no demurrage was charged by Railroad to Merchants because an agency of a railroad is not subject to demurrage charges. Under the decision

in *Keystone Warehouse Company v. Pennsylvania Railroad Company*, 53 I. C. C. 335 (1919) (supra), Railroad would not have been permitted to make such charges. For the same reason, the Reading and Baltimore & Ohio Railroads made no demurrage charges on cars delivered at warehouses of the Pennsylvania Warehousing and Safe Deposit Company (R. 337, 370).

Similarly, the advertising of the warehouses of Merchants by Railroad was merely a normal advertisement by Railroad of its own station facilities. It likewise advertised all the other contract warehouses on its lines (R. 155). No unlawful motive can be inferred from this; nor from the agreements with respect to side-tracks, which were merely incidental to the leases and business agreement between respondents.

It will be shown in the following sub-section that no monopoly resulted from the arrangement between respondents. But it is clear that if an agency relationship had existed, as they thought it did, such a monopoly would not have been unlawful under the Sherman Act. *Donovan v. Pennsylvania Co.*, 199 U. S. 279 (1905) at 297; *Del. L. & W. R. Co. v. Morristown*, 276 U. S. 182 (1928); *Black & White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co.*, 276 U. S. 518 (1928).

It is submitted that all the evidence introduced by petitioner to show the existence of a conspiracy is more compatible with the non-existence of a conspiracy. There could have been none when the first contract was made in 1886, for the warehousing business was then a new one and there was no competitor in the field. Subsequently when the Pennsylvania Warehousing and Safe Deposit Company began a similar business, it had like contracts with the Reading and Baltimore & Ohio Railroad Companies. The ar-

rangement as to both of these warehouse companies continued uninterrupted, as an established business practice, until in 1931 the contracts were ordered cancelled. In all these years there is no date which can be picked out as the date of the formation of any conspiracy. The business simply ran on in its normal course.

It is true that definite proof of a conspiracy can rarely be made, because of the very nature of conspiracy. It is a secret agreement, the existence of which must usually be inferred from other facts. But there was no secrecy here. The contracts were written, a separate one being made for each warehouse; the tariffs were published; indeed, from the beginning of the arrangement, there was not one phase of it that was not entirely open. Forty-five years passed before any suggestion was made that this was a conspiracy. But more important still, there was not, during all those years, one act on the part of either respondent, which could not have sprung from the lawful motive of performing a contract of agency, just as well as from an unlawful purpose to create a monopoly. In such circumstances the question of conspiracy cannot be submitted to a jury. *Ballantine v. Cummings,* 220 Pa. 621 (1908), 630, 631, 632; *Vitagraph Company of America v. Swaab,* 248 Pa. 478 (1915), 490; *Hulings v. Darlington,* 57 Pa. Super. Ct. 535 (1914); *Morrow v. Morrow,* 61 Pa. Super. Ct. 208 (1915).

(b) *Respondents had no monopoly of either the warehousing business or the complementary transportation services.*

As shown above, Merchants was organized in 1886 at a time when there was in Philadelphia no public warehousing business corresponding to the business here under consideration.

A few years thereafter the Reading and Baltimore & Ohio Railroads made contracts with the Pennsylvania Warehousing and Safe Deposit Company similar to the contracts between the respondents, and the warehouses of the Pennsylvania Warehousing and Safe Deposit Company then entered the field as competitors in the business (R. 251-258). Although this was an older company than Merchants, it had no warehouse adjacent to railroad tracks until that time. (R. 252, 283-284.) Thereafter other warehouse companies entered the field, and the petitioner started business in 1904 (R. 202, 210, 252). At the present time there are about ten warehouse companies dividing the business in Philadelphia (R. 209, 262). From this evidence alone, it is clear that Merchants, having started as the only company doing general warehousing business of the sort here in question, has not monopolized the field, but on the contrary has met with active and increasing competition.

Petitioner has been the most aggressive and successful of the competitors. Starting with one warehouse in 1904, nearly twenty years after the formation of Merchants, it has steadily improved and extended its plant to imposing dimensions, so that by 1931 it was twice the size of Merchants, and more than equalled the combined plants of its two nearest rivals, Merchants and Pennsylvania Warehousing and Safe Deposit Company (R. 211, 259, 284).

Petitioner's witness Sullivan stated on direct examination that petitioner owned and operated a total of eleven large and modernly equipped warehouses, with a total floor space of 1,248,000 square feet. (R. 177-179.) The photographs of these buildings, not reproduced in the Record but submitted as physical exhibits, bear out the witness's testimony (Pl. Exs. 11, 12; Defs. Ex. 11). As thus described, petitioner's floor space is about the same as that

of Merchants, which is 1,500,000 square feet (R. 259), and it has more buildings, one of the largest of which was built in 1921, and another in 1926 (R. 207). The witness considered petitioner's plant to be about the same as that of Merchants in every respect (R. 179, 183, 184).

But in addition to the buildings thus described, it was brought out on cross-examination that the Terminal Commerce Building was erected in 1930 by a wholly owned subsidiary of petitioner (R. 210, 211). This gigantic modern warehouse and show room, situated in the heart of the city, is well described, in the advertisement, as follows:

> "*A modern colossus—four squares north of City Hall—spanning a railroad freight station—a city block of offices and show rooms, and thirty-two acres of warehouse space.*" (R. 220; Defs. Ex. 10.)

The witness said that eight out of the thirty-two acres were not suitable for warehousing, but even so, petitioner's floor space for warehousing was thus brought up to nearly 3,000,000 square feet (R. 211), or twice the amount of Merchants' floor space (R 259).

The witness testified that petitioner's floor space was not all occupied, and this is not surprising in view of the fact that petitioner doubled its capacity just at the beginning of the business depression.

Another piece of evidence which conclusively establishes that there was no monopoly of warehousing is a schedule of all the freight, measured in pounds, which was hauled by rail into and out of the several warehouses of Philadelphia during the years from 1927 to 1932. (Defs. Ex. 6, R. 443. The figures for 1933 cover only the number of full carloads.) From this schedule it can be seen that during those years Merchants did a steadily decreasing

amount of business, while the other warehouses of the city were gaining business. This is even more apparent from the percentage of the total warehousing business done by each company in each year. It is noteworthy that petitioner's business outstripped all the others. The figures are as follows:

	Merchants Co.		Terminal Co.		All others	
	weight	per cent.	weight	per cent.	weight	per cent.
1927	676,954,802	46%	311,204,012	22%	476,555,957	32%
1928	618,074,282	44%	328,148,756	24%	466,435,310	32%
1929	572,030,193	42%	333,428,957	24%	472,049,789	34%
1930	474,613,206	37%	303,368,980	24%	502,346,129	39%
1931	363,587,201	32%	335,324,081	31%	415,937,918	37%
1932	225,643,101	27%	252,256,516	31%	340,996,528	42%

(The business of Terminal Commerce Building is included with that of petitioner.)

These figures were compiled from the original records of the three railroads and of Merchants. (R. 265, 313-318.) They provide an accurate statement of the amount of goods handled at all the general warehouses in Philadelphia. They do not include other than warehouse goods. Their accuracy is confirmed by the estimate made by petitioner's witness, Sullivan, of petitioner's yearly business of the type here involved, which corresponds almost exactly with the figures in the schedule. He said it averaged approximately 153,000 tons a year (R. 183, 233). This is the equivalent of about 306,000,000 pounds a year.

The same compilation (Defs. Ex. 6, R. 443) rebuts any charge of monopoly of the complementary transportation services by Railroad. The warehouse freight carried over the railroads that serve Philadelphia is tabulated year by year, from 1927 to 1932. The total weight in pounds, of such freight carried by the Reading Company and the Balti-

more & Ohio Railroad in each year is listed in one column, and that carried by Railroad in another. The figures follow:

	Reading and B. & O.	*P. R. R.*
1927	607,109,202 lbs.	857,605,569 lbs.
1928	634,876,165	777,782,183
1929	634,648,654	742,860,285
1930	607,879,987	672,448,328
1931	577,906,654	537,471,019
1932	472,886,823	345,480,849

It is obvious from these figures that there was no monopoly of the "complementary transportation". *United States v. United States Steel Corporation*, 251 U. S. 417 (1920); *Standard Oil Company v. United States*, 283 U. S. 163 (1931).

Petitioner in its brief (p. 6) declares that the contractual arrangement between Merchants and Railroad proved profitable to both respondents by reason of the increased volume of Merchants' warehousing business and the increased volume of freight moving over Railroad's lines to and from the warehouses of Merchants. Petitioner offered no proof whatever of any such increased volume. On the contrary, the uncontradicted compilations above set forth established a constant decrease in the volume of Merchants' warehousing business as well as in the volume of freight carried by Railroad.

Petitioner has contended that it was unable to get the "heavy density" business, such as flour and wool, and that Merchants had a monopoly of the handling of such goods. The evidence, however, is that even though petitioner may not have shared largely in this part of the business, nevertheless the Pennsylvania Warehousing and Safe Deposit Company handled at least as much of such

business as did Merchants. (R. 252, 253, 256, 285, 307.) This is clearly not proof of a monopoly by Merchants, or by Railroad.

The decisions of this Court and of the inferior Federal courts establish that in such circumstances there is no monopoly.

In *United States v. United States Steel Corporation*, 251 U. S. 417 (1920), it was held that the steel corporation had not achieved a monopoly and that the power attained by it, though greater than that of any one competitor, was not greater than the power possessed by them all; and did not constitute a monopoly. Emphasis was laid on the fact that the corporation could not control the market, and in the present case it is obvious from the figures in the record (R. 265, 313-318 and pp. 82-83, supra) that respondents could not and did not control the market which they were steadily losing.

The opinion of the District Court in the same case, reported in 223 Fed. 55 (1915), states in detail the volume of the business done by the corporation and its proportion to the entire business done in that field. The court pointed out (pp. 67, 68) that while the business of the corporation had increased substantially between 1901 and 1911, yet the business of its competitors had increased in greater proportion. In other words, the steel corporation was doing a smaller percentage of the entire business for a number of years preceding the bringing of suit. The court said, at page 67:

> "Since therefore the gist of monopoly is the suppression of competition, we deem it pertinent to ascertain from the proofs the character and steady increase of competition in the iron and steel business since the Steel Corporation was formed."

And at page 68:

> ". . . the real test of monopoly is not the size of that which is acquired, but the trade power of that which is not acquired."

To the same effect are *Standard Oil Company v. United States*, 283 U. S. 163 (1931); *Glenn Coal Co. v. Dickinson Fuel Co. et al.*, 72 Fed. (2d) 885 (1934) (C. C. A. 4).

Applying this test to the present case, it cannot be said that there was any monopoly. The steady increase in the number of competing warehouses, and in the volume of business done by them, demonstrates beyond any doubt that Merchants did not dominate the business, and as a matter of fact, had no control over it whatever. The same conclusion as to the complementary transportation services must be drawn from the decline in the warehouse freight carried by Railroad during the same period and the corresponding increase of the tonnage in that freight transported by competing railroads. It is accordingly submitted that the jury should not have been permitted by the trial court to find that a monopoly existed as to either.

(c) *No restraint of the warehousing business and complementary transportation services was proved.*

It was settled by the decision in *Standard Oil Company v. United States*, 221 U. S. 1 (1911), that the Sherman Act is not directed against all restraint of interstate commerce, but prohibits only unreasonable restraint, and in the present case, the court so instructed the jury. However, it is submitted that there was no evidence of unreasonable restraint, and that the question of such restraint should not have been submitted to the jury.

A combination between Railroad and Merchants could not have the direct effect of restricting competition, since the two companies were not in competition with each other. A business agreement between the two is not a monopoly or restraint of either type of business. *Alexander Milburn Co. v. Union Carbide & Carbon Corp.*, 15 Fed. (2d) 678 (1926) (C. C. A. 4), certiorari denied 273 U. S. 757 (1927); *United States v. Winslow*, 227 U. S. 202 (1913). In the latter case this Court said at page 217:

> "The business of the several groups that combined, as it existed before the combination, is assumed to have been legal. . . . As . . . they did not compete with one another, it is hard to see why the collective business should be any worse than its component parts. It is said that from seventy to eighty per cent. of all the shoe machinery business was put into a single hand. . . . We can see no greater objection to one corporation manufacturing seventy per cent. of three non-competing groups of patented machines collectively used for making a single product than to three corporations making the same proportion of one group each."

That the matters complained of could have or did result in restraining the competing warehousing business or railroad services is not supported by any evidence.

This is clear from the following analysis, contained in *Continental Candy Corporation v. California & Hawaiian Sugar Refining Co.*, 270 Fed. 302 (1920), at 305:

> "The only way, or at least one of the most satisfactory ways, by which you can determine what is the reasonableness or unreasonableness of the restraint put upon trade by a contract is to consider the motive, extent and effect of the contract, consider the circum-

stances under which it was made, consider what the parties had in mind, what motives served to move them to the various ends they sought to attain, and then, in the light of those considerations, say whether or not that which they did was, under all the circumstances obtaining, in its nature and effect, unreasonable in its restraint upon the free flow of the commerce involved."

Applying this test to the evidence in the present case, the conclusion is inescapable that there was no unlawful restraint. Merchants was organized and the contract with Railroad was made in 1886, when the existing facilities for the delivery of flour had become obsolete, due to the elevation of the tracks on Market Street. Other warehouses were leased to Merchants, or constructed by it, at different points throughout the city, as the need for them developed. After a few years the Reading and Baltimore & Ohio Railroads made similar contracts with the Pennsylvania Warehousing and Safe Deposit Company. These warehouse facilities in fact were improvements in the service rendered by the railroads, and were a great convenience to the public (R. 251-258). This was the purpose and motive behind the arrangements. As shown in the preceding section the railroads and their respective contract warehouses believed their relationship to be that of principal and agent. Their good faith in this has not been questioned, and there is no evidence of any conspiracy or purpose to monopolize warehousing. The extent and effect of the arrangement upon the warehousing business in Philadelphia has already been discussed in the preceding section of this brief, and it has been seen that no monopoly was in fact created. There has been steadily increasing competition in the business, and in the last five years before the cancellation of the contracts, Merchants was losing ground while its competitors, especially petitioner, were

gaining. This evidence discloses no unreasonable restraint of the warehousing business. *Appalachian Coals, Inc. v. United States,* 288 U. S. 344 (1933); *National Association of Window Glass Mfrs. v. United States,* 263 U. S. 403 (1923); *Moore v. New York Cotton Exchange,* 270 U. S. 593 (1926).

4. Petitioner failed to show it had suffered any damage.

Petitioner's proofs of alleged damages are fatally defective in several respects. They set up and apply an improper and wholly speculative measure of damage. Moreover, they hopelessly commingle many alleged items of damage which are either of themselves inadmissible or in no wise connected with any act for which respondents are responsible. These defects will be fully discussed as they arise in our analysis of the evidence; and are the subject of Respondents' 9th, 10th, 11th, 12th, 13th, 14th, 15th, 33rd, 34th, 35th, 36th, 37th, 38th, 39th and 42nd Assignments of Error (R. 638-40, 647-49).

This analysis is the answer to the statement in petitioner's brief (p. 34) that respondents' objections to the sufficiency of the proofs of damage are only technical; and will also show how unjust is the oft repeated charge by petitioner (Brief, pp. 12, 22, 33-38) that Merchants was guilty of "grossly unfair warehouse rates and practices".

(a) *Petitioner's so-called "normal rate" was an arbitrary rate wholly unrelated to "prevailing rates" and afforded no standard for measuring damages.*

Having elected through force of circumstances to confine its claim for damages to an alleged loss of profits on business actually transacted, petitioner called as its sole

witness on this subject its president, Ernest V. D. Sullivan; and he testified that petitioner was forced to reduce its normal warehouse charges on lighter forms of package freight in order to meet Merchants' competition (R. 196). He stated that he was not then prepared to give exact figures respecting petitioner's alleged loss of profits but could give an average figure of petitioner's revenue per year derived from the storage and handling of package freight (R. 199-200). Upon objection by respondents' counsel to this offer of proof, leave was granted to petitioner to recall the witness later on this phase (R. 200).

Counsel for petitioner in his direct examination repeatedly suggested to the witness that petitioner had been compelled to shrink its charges below its "normal rates" (R. 197-200), so upon cross-examination counsel for respondents asked the witness to define petitioner's so-called "normal rates", to which he replied "*the rate we know we have to get in order to pay for the cost of the service*" (R. 213). He expressly disavowed that petitioner's "normal rates" were synonymous with "the average rate that all warehouses of a similar type of construction charge" (R. 213), adding that he could not speak for other warehouses but that he knew petitioner did not get its so-called "normal rates" (R. 214). With great reluctance he ultimately admitted that petitioner's rates varied with the customer and that petitioner cut its rate as the occasion demanded (R. 215-216). There was, however, no attempt to show that petitioner had ever been forced to charge less than an amount which other warehouse companies found adequate to make their business profitable, or, indeed, that during its period of rapid and extensive expansion it had ever received what it now calls its "normal rates". Nor was there any evidence that,

after the cease and desist order became effective, petitioner was able to or did increase its rates.

Petitioner's president produced no costs sheets or other data to show what were petitioner's service costs and how they were divided up into labor, overhead and the like and how petitioner's service costs compared with those of other warehouses. The cause for this silence is readily understood, when the defense witness, Warren T. Justice, vice-president of Pennsylvania Warehousing and Safe Deposit Company, a wholly disinterested third party, subsequently testified without contradiction that no warehouse in Philadelphia had ever even approached petitioner's so-called "normal rates" (R. 380). The legal effect of petitioner's silence, as stated by Circuit Judge Buffington in *United States v. United States Steel Corporation,* 223 Fed. 55 (1915), at pages 81-82, was to leave the trial court without proof from which it could intelligently determine the fairness of petitioner's costs.

The following day petitioner's president was recalled to the stand and testified over the objection of respondents' counsel that petitioner's revenue for handling package freight during the period in suit amounted to the lump sum of $364,517.47 (R. 235); and further that petitioner's revenue for the same, computed at its so-called "normal rates" would have been $901,795.82 (R. 237).

For business reasons of its own, the rates charged at Terminal's warehouses have always been cut rates (R. 196, 197, 214, 262-265), and having used that weapon to get business which it could not otherwise have obtained, petitioner cannot saddle that cut rate upon respondents as a standard for measuring damages. The fact that petitioner voluntarily lowered its rates below the prevailing rate and thus obtained business which otherwise would have been

handled at the prevailing rate cannot be used by petitioner to enhance its damages.

Were petitioner's contention sustained, the practical effect would be to penalize the respondents, not merely for what they are alleged to have done, but because all the other 10 or 12 warehouse systems in Philadelphia, by the competition they offered, made it impossible for petitioner to make as large a profit from its business as it would have liked.

It is very significant that counsel for petitioner did everything within his power to make Mr. Sullivan state, when recalled to the stand, that petitioner's so-called "normal rates" were the prevailing Philadelphia rates, but without success. For example, he specifically asked the witness, "Q. How much would you have received at the *prevailing prices* if it had not been for this undercutting?" (R. 236), after the court upon objection of respondents' counsel had pointed out that petitioner's so-called "normal rates" provided no standard of comparison but that the witness knew the prevailing prices and might testify as to them (R. 236). In answering the question, the witness deliberately ignored the prevailing prices and said, "A. *Our revenue* for the handling service, computed at *our regular tariff rates,* would have been $901,795.82" (R. 237).

In answer to petitioner's so-called "normal rates", respondents proved by wholly disinterested third party witnesses, and without contradiction, that warehouse rates in Philadelphia were more or less standardized by competition or through negotiations with the Commercial Exchange; that Merchants charged the full prevailing rate and was known as a high charger who never cut rates like Terminal; that the rates prevailing in Philadelphia were not only in

competition with Baltimore and Wilmington rates, but also were the same as rates in other cities, and that no other warehouse had ever charged or attempted to charge petitioner's excessive but so-called "normal rates" (R. 243, 253, 261-262, 267, 285, 319-320, 331-332, 334, 336, 338, 340, 343, 345-346, 348-349, 351, 352, 353, 361, 363, 380, 383).

There was not a scintilla of evidence to show that petitioner could have retained its customers, had it ever attempted to charge its excessive so-called "normal rates". On the contrary, many of the twenty-five disinterested merchants called as witnesses by respondents testified that Terminal had solicited their business at cut rates but that they continued with Merchants at higher rates because of the latter's superior and eminently satisfactory service (R. 331, 343, 349, 352). The only possible inference that can be drawn from petitioner's admitted price-cutting practices is that the latter's business depended upon its lower prices and could not have been retained if the higher prices obtained by Merchants and other competing warehouses had been charged. The inferior quality of its service was adversely commented upon by as many of the aforesaid disinterested witnesses as had dealt with Terminal (R. 330, 336, 338, 343, 353, 355).

The foregoing analysis of the evidence on damages establishes the utter unreliability of petitioner's so-called "normal rates" as a measure of damages. They represent an arbitrary figure, greatly in excess of the prevailing Philadelphia rate and based on costs, as to the fairness of which there was no proof. The trial judge should have ruled, as the Interstate Commerce Commission had previously ruled (R. 484-485), that petitioner's proofs of alleged damages were too vague and indefinite to permit a recovery and that the jury should not be permitted to speculate

thereon. Under the decisions of this Court, petitioner was bound to establish its damages with certainty; and where, as here, there was available a measure of damages which was not only proper and customary but also precluded all possibility of conjecture, petitioner must set up and follow that measure. In no circumstance should a jury be given *carte blanche* to guess what petitioner's alleged damages might be.'

The degree of certainty required in the proof of damages for an alleged violation of the Sherman Act was discussed at length by Mr. Justice Sutherland in *Story Parchment Co. v. Patterson Co.*, 282 U. S. 555 (1931), which was an action to recover damages resulting from an alleged conspiracy to monopolize interstate trade and commerce in vegetable parchment, to exclude the plaintiff therefrom and to destroy its business. The following quotations are from the opinion (pp. 562, 563):

> "There was evidence from which the jury reasonably could have found that in pursuance of the conspiracy respondents sold their goods below the point of fair profit, and finally below the cost of production; that petitioner had an efficient plant and sales organization, and was producing quality of paper superior to that produced by either of the three companies; and that current prices, shown in detail, were higher during a period antedating the unlawful combination and price cutting in pursuance of it than afterwards. It does not necessarily follow, of course, that these higher prices would have continued except for the conspiracy, but it is fair to say that the natural and probable effect of the combination and price cutting would be to destroy normal prices; and there was evidence of the prices received by petitioner before the cut prices were put into operation, and those received after, showing actual

and substantial reductions, and evidence from which the probable amount of the loss could be approximated.

. . . . . .

". . . *It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncercertain in respect of their amount.* Taylor v. Bradley, 4 Abb. Ct. App. (N. Y.) 363, 366-367:" (Italics supplied.)

The salient facts of the *Story Parchment* case (supra) are typical of a conspiracy case under the Sherman Act; and are the very antithesis of the unique facts of the present case. First, the price cutters in the former case were the alleged conspirators, whereas respondents are concededly the high chargers and petitioner, the alleged victim, is the party that cut its price below the prevailing Philadelphia rate. Second, the alleged combination in the former case aimed to upset existing business practices and bring about a price war in order to diminish the volume of business of the innocent victim and depreciate the value of that victim's plant, whereas in the present case there was no change in the method of respondents' business between 1886 and 1931 (R. 251-253, 261), the same contractual relationship between respondents existed in 1904 when the victim, petitioner, began business and continued unchanged until the decision of this Court in May, 1931, except that the payments made to Merchants by Rail-

road were increased during the World War in accordance with the upward trend of prices (Defs. Ex. 5; R. 439-443), and in lieu of a price war, Merchants always charged the highest prevailing Philadelphia rate and was able to collect the same by reason of its superior service and more convenient location (R. 242, 254, 269-270, 310, 328, 330-331, 340, 342-343, 346, 348-349, 350, 352, 357). The result of the unchanged business practices of respondent during 47 years was that the business of Merchants gradually declined as the business of Terminal correspondingly increased so that today petitioner, the newcomer and the alleged victim of a conspiracy, dominates Philadelphia's warehousing business and has far outstripped its competitors in storage facilities and volume of business.

Thirdly, the fact of damage was established beyond all doubt in the former case, whereas there was a complete failure to prove that fact in the instant case. Fourthly, it was possible to measure any damages sustained with certainty in both cases; and although this was done with meticulous care in the *Story Parchment* case by showing the prevailing prices before the price war, the cutting of the conspirators' prices below the cost of production, the innocent victim's prices before and during the price war, and itemized statements of the latter's costs of production, including not only the cost of all materials used but also the costs of labor, supervision, power, water, machinery, repairs and maintenance, as well as detailed statements of the cost of the victim's plant, land, buildings, machinery and other equipment and the amount realised therefrom upon a forced sale, yet in the present case petitioner deliberately refused to show the prevailing Philadelphia rate and set up an arbitrary figure called its "normal rates", which was based entirely on petitioner's costs, without any proof of

what those costs were and how they compared with the costs of other warehouses, or whether they were comparatively, or inherently reasonable. Finally, in the former case the immediate result of the combination was a destructive and adverse effect upon the alleged victim's business, whereas when petitioner eventually succeeded in upsetting the long-existing contractual relationship between respondents, there was apparently no effect whatever upon the business of either the conspirators or the alleged victim.

It is an undisputed fact that there was no sudden and appreciable decrease in the business of either Merchants or Pennsylvania Warehousing and Safe Deposit Company—the two warehouses receiving payments from the Pennsylvania, Reading and B & O. Railroads—following the discontinuance of said payments (R. 274, 286); nor was there any immediate and substantial increase in the business of Terminal, the victim (R. 208-209). The business of all three warehouse companies continued about the same, unaffected by the striking down of the payments.

Circuit Judge Sanborn in *Central Coke & Coal Co. v. Hartman*, 111 Fed. 96 (1901) (C. C. A. 8) laid down the following measure for the recovery of damages for an alleged combination in restraint of trade in violation of the Sherman Act (p. 98):

> ". . . Actual damages only may be secured. Those that are speculative, remote, uncertain, may not form the basis of a lawful judgment. The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. The speculations, guesses, estimates of witnesses, form no better basis of recovery than the speculations of the jury themselves. Facts

must be proved, data must be given which form a rational basis for a reasonably correct estimate of the nature of the legal injury and of the amount of the damages which resulted from it, before a judgment of recovery can be lawfully rendered. These are fundamental principles of the law of damages."

Applying the principles of the *Central Coke & Coal* case, (supra) to the proofs of damages adduced by petitioner, it is patent that the damages claimed rest upon the speculation and guess of petitioner's president which cannot form a rational basis for correctly measuring the damages with reasonable certainty. There is entirely lacking any proof whatever of petitioner's costs, upon which rests its so-called "normal rates"; and whether or not petitioner could have ever collected those rates is a matter of pure conjecture. The guess of its president cannot be used as a basis for a further guess by the jury. In the present case, the trial judge without warrant of law permitted the jury to venture a guess upon a guess as to the damages alleged to have been suffered by petitioner.

(b) *Miscellaneous items in petitioner's alleged damages for which respondents were not responsible.*

The greater portion of petitioner's claim for lost profits is founded upon tonnages brought to its warehouses by the Reading Railroad, by trucks and by steamship lines. Petitioner's president was forced to admit on cross-examination that more than sixty per cent. of its rail-borne traffic came over the Reading (R. 213) and Defendant's Exhibit No. 6 shows an even higher percentage—in the year 1932 the Reading traffic was approximately seven-ninths as compared with two-ninths over the Pennsylvania (R. 443-449). Moreover, petitioner's president further admitted on cross-examina-

tion that a substantial portion of Terminal's business was handled by its extensive trucking department (R. 183, 219, 231).

Before the Interstate Commerce Commission, petitioner claimed that its alleged loss of profits was attributable to the payments respectively made by the Pennsylvania, Reading and B. & O. Railroads to Merchants and Pennsylvania Warehousing and Safe Deposit Company and used by the latter to depress rates (Defs. Ex. 12; R. 502-503); and therefore separate complaints were filed by petitioner against all three railroads. But in the present suit petitioner abandoned its prior position and took the anomalous stand that Merchants was alone responsible for the entire loss in spite of respondents' uncontradicted proofs that the payments to Merchants were confined to tonnage shipped over the Pennsylvania, that Merchants had little or no traffic over the Reading (Defs. Exs. 1 and 6; R. 267-268, 443-449), that Pennsylvania Warehousing and Safe Deposit Company, the nearest rival of Merchants in tonnage, floor area and class of business, received an overwhelming portion of its traffic by the Reading and that the Pennsylvania Warehousing and Safe Deposit Company not only was paid by the Reading and B. & O. Railroads under contracts similar to the contracts between respondents but also gave the same forty-eight-hour free service and free demurrage (Defs. Exs. 2, 3, 4, 6 and 13; R. 253, 267-268, 285-286, 443-449).

These proofs by respondents established that petitioner's rival for its Reading traffic was the Pennsylvania Warehousing and Safe Deposit Company, which latter company was paid for its service in handling tonnage moving over the Reading under an arrangement identical with that between respondents and granted to its patrons the same forty-eight-hour free service and the same free demurrage

of which petitioner now complains (Defs. Exs. 2, 3 and 4; R. 243, 253, 285-286, 333, 335, 337, 338). It is uncontradicted that Merchants handled Reading tonnage on exactly the same basis as Terminal and did not grant its customers free handling service and demurrage with respect to said tonnage. Clearly, Merchants could not be held responsible in damages for having prevented petitioner from collecting its so-called "normal rates" upon Reading tonnage; nor could Merchants be held accountable for any lost profits on Terminal's thriving truck traffic and its steamship traffic.

Another inadmissible item in petitioner's proof of alleged damages was the payment of $634,886.16 to Merchants by Railroad for handling services during the period of suit, which payment petitioner was permitted to set up as a covert standard for measuring its alleged loss of profits of approximately $536,000.00. When counsel for respondents objected to the introduction of this payment in evidence, counsel for petitioner stated "we do not claim now, nor never have claimed that the amount of the allowances paid was an item of our damage" (R. 171). The trial judge sustained the objection of respondents' counsel in the first instance and refused to admit the said payment in evidence, stating that if the offer was followed by proof that the said payment not only enabled Merchants to give its patrons better rates than any other warehouse but also that Merchants actually gave better rates, then the offer would become admissible (R. 174-175). The following day the said payment was again offered and admitted in evidence over the objection of respondents' counsel, who pointed out that petitioner had not fulfilled the condition precedent to its admissibility by showing that Merchants had actually given better rates because of the said payment (R. 247-248). Moreover, respondents proved by uncontradicted and disin-

terested witnesses that there was a prevailing Philadelphia rate, which Merchants always charged and which was not less than the rate charged in other cities (pp. 91-92, supra).

If counsel for petitioner was serious in his statement that the said payment was not an item in its claim for lost profits and if the said payment was not offered in evidence as a misleading standard from which the jury was expected to draw a parallel between the alleged lost profits of approximately $536,000.00 and the payment of approximately $635,000.00, then there could be no valid reason for the refusal of respondents' point for charge that the said payment was not evidence of the measure of petitioners' damage and should not be considered by the jury in fixing the amount of a verdict (R. 552, 547). This is particularly true when the trial judge, over the objection of respondents' counsel, directed the jury's attention to the payment of $634,886.16 in terms of a "very formidable weapon . . . in dealing with its competitors" (R. 584-585), although there was an entire absence of any proof that the said payment had been so employed by Merchants, but refused to point out to the jury that the said payment was not a standard for measuring petitioner's alleged loss of profits.

Finally, petitioner was permitted to offer incomplete and wholly irrelevant proof that it had been damaged by reason of its payment for demurrage and maintenance of side-tracks. After establishing that Merchants was not charged by Railroad for car detention because the former's warehouses had been considered freight stations and treated as such for years under the series of contracts between respondents, and after producing one receipted demurrage bill as illustrative of the bills paid by Terminal (Pl. Ex. 13; R. 185), petitioner was permitted to offer in

evidence extended schedules of alleged car detention by Merchants for which it was charged nothing by Railroad (Pl. Exs. 19 and 20; R. 169-170, 246-249).

The fact that Merchants paid no demurrage does not constitute competent evidence in support of petitioner's claim for diminished profits on business actually done. In order to establish that claim of damage, petitioner bore the burden of proving the exact amount of free demurrage granted to Merchants, direct causal connection between Merchants' non-payment of demurrage and any alleged diminution in petitioner's profits on actual business, and the extent of the alleged lost profits.

The free demurrage granted to customers of Merchants cannot be used to further petitioner's claim for lost profits for an additional reason. The twenty-five disinterested Philadelphia merchants called by respondents testified that they had never requested Merchants to hold up delivery of their carload shipments, but that on the contrary they were always pressing Merchants for as early delivery thereof as possible (R. 319-320, 328-368). The granting of free demurrage to Merchants' customers cannot be attributed to any deliberate action on the part of Merchants or its customers; and Merchants may not be penalized in damages for an alleged privilege not of its own seeking and contrary to the desires of its customers. Of course, to allow carload shipments to remain unloaded meant lost storage business to the warehouse; and for that reason was not encouraged by Philadelphia warehouses.

Petitioner in its brief (p. 30) argues as if it had affirmatively proved that Merchants granted free demurrage at the request and for the convenience of its customers. Petitioner offered not an iota of proof, oral or documentary,

to contradict the only evidence in this regard, to-wit, that no such request had ever been made.

It should be noted that many of respondents' disinterested witnesses corroborated the fact that the Pennsylvania Warehousing and Safe Deposit Company was never charged by the Reading and B. & O. Railroads for any car detention; and inasmuch as more than 60 per cent. of petitioner's rail-borne tonnage came over the Reading and B. & O., there could be no possible connection between this tonnage upon which demurrage was alleged to have been paid and the almost exclusive Pennsylvania tonnage of the Merchants, upon which admittedly no demurrage was paid. One again wonders under what possible theory Merchants can be penalized for an injury suffered, if at all, through the nonpayment of demurrage by its rival, Pennsylvania Warehousing and Safe Deposit Company.

The Interstate Commerce Commission had exclusive primary jurisdiction over the payment or non-payment of demurrage charges under the series of contracts between respondents; and this issue was brought by petitioner to the attention of the Commission and was included in its cease and desist order (Defs. Ex. 12; R. 451-522). This being the fact, it could have no place in a subsequent action under the Sherman Act as it represented an item of damage for which reparation had been sought but denied by the Commission.

What has been said about petitioner's proofs with respect to demurrage applies with equal force to its claim of loss based upon the admitted fact that petitioner was liable for the construction and maintenance of railroad sidings to its warehouses. First, this was an administrative fact for the exclusive primary jurisdiction of the Commission; and the remedy, if any, lay at the hands of the Com-

mission. It could not constitute the basis for a jury award of damages under the Sherman Act. Second, petitioner offered no proof whatever as to its expenditures in constructing and maintaining its sidings and also offered no proof as to any alleged savings by Merchants by reason of any alleged free construction and maintenance of side-tracks by the Pennsylvania. There was nothing in the evidence to support a dollar of damage upon this score. Thirdly, respondents proved without contradiction that Merchants' side-tracks were mainly located on Railroad premises leased to Merchants for a substantial rental so that the construction and maintenance of side-tracks were included in the rental (R. 165). Lastly, there was the same arrangement between the Pennsylvania Warehousing and Safe Deposit Company and the Reading and B. & O. Railroads for side-tracks that existed between Merchants and the Pennsylvania, so that it would be impossible to differentiate any injury suffered by petitioner by reason of Merchants' agreements with the Pennsylvania under the evidence in the present record.

5. The trial judge lacked authority to treble the jury's verdict.

Even though it be assumed, arguendo, that petitioner was entitled to recover a verdict, respondents maintain that the trial judge committed prejudicial error in trebling the verdict and awarding an attorney's fee because only the jury might treble the damages.

Section 7 of the Sherman Act (15 U. S. C. A. 15, historical note) is included in the broader Section 4 of the Clayton Act (15 U. S. C. A. 15), and accordingly they will be interchangeably discussed under this heading.

Respondents' 44th, 46th and 47th Assignments of Error (R. 650) deal with the question of the power of the court under the statute (sec. 4 Clayton Act) to treble a verdict rendered by a jury.

Petitioner's Statement of Claim states in the preamble (R. 8):

> "The Terminal Warehouse Company, a corporation, plaintiff, claims of the Pennsylvania Railroad Company, a corporation, and the Merchants Warehouse Company, a corporation, defendants, the sum of four million five hundred thousand dollars ($4,500,000) (treble damages) upon a cause of action whereof the following is a statement."

It states further (par. 20, R. 15):

> "Plaintiff, therefore, claims of Pennsylvania Railroad Company and Merchants Warehouse Company the sum of $4,500,000, which is treble the amount of the damages by it sustained."

The Court charged the jury that the question before it was what amount it should assess the damages which the plaintiff had sustained (R. 544), saying:

> "You will determine that question and when you are asked as to whether or not you have agreed upon your verdict, if it should be in favor of the plaintiff you say 'we find in favor of the plaintiff' and assess the damages at so much, at whatever sum you find those damages to be."

The question was raised upon defendants' answers to plaintiff's motion for the entry of judgment in treble the amount of the verdict of the jury (R. 612, 613, 614, 615)

and was dealt with in the opinion of the Court above referred to in title "Discussion" (R. 625), and an exception was allowed by the Court to the order making absolute plaintiff's rule for judgment for treble the amount of the verdict (R. 530).

Section 4 of the Clayton Act provides that "any person who shall be injured may sue therefor and *shall recover threefold* the damages by him sustained and the costs of suit, including a reasonable attorney's fee." The question whether under this statute the trebling of the damages may be done by the jury and expressed in its verdict, or whether a verdict of the jury must be trebled by the Court, has not heretofore been specifically passed upon. The practice has been for the jury to find a verdict for actual damages, whereupon the Court trebles the verdict and enters judgment for the amount thereof, but there is no definite decision establishing such practice. There are numerous references to this practice in the decisions of the District Courts, the Courts of Appeal, and this Court. However, these references are not decisions upon the question, which has not been specifically raised.

The word "recover" commonly means the amount for which the plaintiff is entitled to have a verdict from a jury. There is no express power in the statute (sec. 4 Clayton Act) that the Court may treble the amount of a verdict rendered by the jury. The Federal cases in which the matter has in any way been referred to are *Montague & Co. v. Lowry*, 193 U. S. 38 (1904), where this Court said (p. 42):

> "Pursuant to the provisions of the seventh section of the Act, judgment for treble that sum [the verdict] was entered for the plaintiffs."

Story Parchment Co. v. Patterson Parchment Paper Co., 282 U. S. 555 (1931), at page 559, this Court saying:

> "The trial court approved the verdict and rendered judgment for treble the amount of the damages in accordance with section 7 of the Act."

These are mere factual statements, as the question was not raised in the trial or on the appeal.

Thus, in *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359 (1927), at 368, there is a mere statement that the Court did treble the actual damages. There is a similar statement in *United Mine Workers of America v. Coronado Coal Co.*, 259 U. S. 344 (1922), 347, and *Coronado Coal Co. v. United Mine Workers of America*, 268 U. S. 295 (1925), at 297; also in *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U. S. 390 (1906), at 396.

Similar statements have been made in opinions in the Federal Courts. *Straus v. Victor Talking Machine Co.*, 297 Fed. 791 (1924), at 796; *American Can Co. v. Ladoga Canning Co.*, 44 Fed. (2d) 763 (1930), at 765.

Light is thrown upon the question in the case of *Clark v. Pennsylvania Railroad*, 241 Pa. 515 (1913) and 238 U. S. 456 (1915). This was an action brought in a common pleas court to recover compensation for alleged acts of discrimination under the Pennsylvania Act of June 4, 1883, P. L. 72, permitting treble damages to be recovered in such cases.

The provisions of that Act are: "Any violation of this provision shall make the offending party or common carrier liable to the party injured for damages treble the amount of injury suffered." In the Clark case a verdict was returned by a jury finding single damages in the sum of $41,481, and also finding that there was discrimination practiced of such a

character that it was entitled to recover treble damages under the Act in such case made and provided, and therefore entitling it to a verdict in the sum of $124,443 (241 Pa. 516). On the motion for a new trial the report of the case says: "*A verdict for plaintiff* for $124,443 and judgment thereon."

The case went to this Court (238 U. S. 456, 1915) on an appeal from the judgment above referred to. The opinion of the Court (Mr. Justice Hughes, 238 U. S. 459) states: "The trial court overruled these contentions of the defendant. *The jury,* finding discrimination, *assessed the damage at $41,481 and trebled the amount,* making $124,443. . . . Judgment for the total amount of the verdict was entered and was affirmed by the Supreme Court of the State, 241 Pa. 515."

The provision of the Pennsylvania statute above recited, namely, that the offending carrier is liable to the party injured for damage treble the amount of the injuries suffered is not different in substantial effect from the phrase "recover treble damages". This decision is a recognition of the proper practice here contended for. There is a conflict in the Federal Courts on the construction or application of the provisions of the Act authorizing the recovery of treble damages. The question is now, therefore, expressly submitted to the Court upon the proposition that there is no power given to the Court to enter judgment in excess of the amount of the verdict with costs, the sole verdict upon which judgment can be entered being that rendered by the jury.

Upon the question of damages the Court charged the jury as follows: "If you find that question in favor of the plaintiff, to wit, that it has been injured in its business or property by an unlawful combination or conspiracy on the

part of the defendants, then you go to the final question in the case and that is, how much; at what amount are you to assess the damages which the plaintiff has sustained? In other words, what are you to assess, expressed in dollars and cents, as the loss you would have found in that case the plaintiff had sustained." (R. 540.) And again: "If it [the verdict] should be in favor of the plaintiff you say we find in favor of the plaintiff, and assess the damages at so much, at whatever sum you find those damages to be." (R. 544.)

The Court gave no instruction that the verdict of the jury would be trebled by the Court. The jury, as above stated, having heard the statute that the petitioner was entitled to recover treble damages, may well have given to petitioner treble the amount of the actual damages which it found the plaintiff had suffered, and which it claimed in its Statement of Claim.

There is nothing in the case at bar to show that the jury by its verdict had not considered and awarded treble damages.

The jury in this case could have done so and probably did do so, because it had presented to it in the argument of counsel in opening the case and in the concluding arguments the express terms of the statute in regard to the right to recover treble damages.

The position of respondents, therefore, is

(1) That judgment should have been entered only for the amount of the verdict—$136,125. with costs (R. 555) and not for treble the amount of the verdict.

(2) That the Court, having failed to charge the jury on the question of simple damages or treble damages, as in *Montague & Co. v. Lowry*, 193 U. S. 38 (1904), the inference is that the jury, having knowledge of the statute, by its ver-

dict rendered a verdict which was intended to be all that petitioner was entitled to "recover", and that, therefore, the judgment should be reversed.

C. CONCLUSION.

For the several reasons above stated, respondents respectfully submit that

1. The present action under the Sherman Act was barred by the prior proceeding before the Interstate Commerce Commission;

2. The cause of action averred by petitioner is under the Interstate Commerce Act and not under the Sherman Act.

3. The general warehousing business in Philadelphia is not interstate commerce and any alleged monopoly or restraint of said business cannot under the Constitution give rise to an action for damages under the Sherman Act;

4. The evidence in the present case did not show any monopoly or restraint, or any combination or conspiracy to monopolize or restrain the warehousing business in Philadelphia or any other business;

5. Petitioner failed to prove that it had suffered any damages; and the jury under instructions of the trial court were permitted to apply an improper measure of damages; and

6. The trial court lacked authority to treble the damages awarded by the jury.

Respondents therefore request this Court to affirm the action of the Circuit Court of Appeals in reversing the judgment and to instruct the District Court to enter judgment for respondents.

Respectfully submitted,

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p. 6

SUPREME COURT OF THE UNITED STATES.

No. 351.—October Term, 1935.

Terminal Warehouse Company, Petitioner, *vs.* Pennsylvania Railroad Company and Merchants Warehouse Company, Respondents.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[March 2, 1936.]

Mr. Justice Cardozo delivered the opinion of the Court.

In this action under the Anti-Trust Laws (15 U. S. C., §§ 1, 15) for the recovery of treble damages, the Terminal Warehouse Company, petitioner in this court, accuses a competitor, the Merchants Warehouse Company, and the Pennsylvania Railroad Company, an interstate common carrier, of an unlawful combination in restraint of trade and commerce.

The business of Merchants Warehouse Company, which for brevity will be spoken of as Merchants, began in January, 1887. Its site was the City of Philadelphia. At the beginning there were two warehouses, both in convenient proximity to the Pennsylvania's tracks and terminals. Other buildings were added from time to time by purchase or by lease to serve other sections of the city. From the outset Merchants had contracts with Pennsylvania for privileges and payments special to itself. These are the contracts of which Terminal complains. They were renewed as they ran out from 1887 to 1931, a separate contract being made with reference to each building. For present purposes a summary of one contract will serve as a summary of all, though they differ in particulars. For illustration we choose the contract of January 25, 1917, which has to do with the warehouse at Water and Chestnut Streets. By this contract Pennsylvania agrees to maintain tracks adjacent to the warehouse and to make payments at stipulated rates for services rendered by the warehouse in the receipt and delivery of freight. While the contract is in force, there is to be no allowance for such services to any other warehouse company in the City of

Philadelphia. In return Merchants agrees to give a preference to Pennsylvania over other lines in the use of its facilities; to load and unload freight promptly and efficiently; to collect charges due for incoming freight, and to be responsible to the railroad company therefor.

No secret was made of the existence of this contract or of any of the others. On the contrary, the substance of the whole arrangement was set forth in the tariffs of the railroad filed with the Interstate Commerce Commission and open to the public. Pennsylvania there showed that it had designated the warehouses of Merchants as stations for the receipt and delivery of freight. It also showed the amount of the payments and allowances to be made to Merchants for services in handling freight at the stations so designated. For many years the practice went unchallenged by any agency of government. The assumption was that the warehouses, though not owned by Pennsylvania, were, none the less, public freight stations supplied by a contractor (*United States* v. *Baltimore & Ohio R. Co.*, 231 U. S. 274, 288), and that the railroad in making payments or allowances for the handling of the freight was paying for transportation services rendered by an agent. Decisions of the Interstate Commerce Commission bring this out in clear relief. *Keystone Warehouse Co.* v. *Pennsylvania R. Co.*, 53 I. C. C. 335; *Keystone Elevator & Warehouse Co.* v. *Director General*, 73 I. C. C. 273, 274;; *McCormick Warehouse Co.* v. *Pennsylvania R. Co.*, 95 I. C. C. 301. Those cases stood unquestioned until 1928, when one of them (*McCormick Warehouse Co.* v. *Pennsylvania R. Co., supra*) was reheard and overruled (148 I. C. C. 299), earlier decisions to the same effect falling along with it. The conclusion was then announced that a warehouse company doing business under such a contract was a consignor or consignee, acting on its own behalf and not as agent for the carrier. With this change in its relation discriminatory payments or allowances became forbidden and unlawful. 49 U. S. C., § 3 (1).

Terminal, a rival warehouse, organized in 1904, was quick to occupy the vantage-ground left open by that ruling. It laid before the Interstate Commerce Commission a complaint charging Pennsylvania with unjust discrimination in the practices described. It asked that a restraining order protect it for the future, and that there be an award of reparation for losses suffered in the past. There were separate complaints as to the acts of other railroads

(the Baltimore & Ohio and the Reading), which had terminal arrangements with warehouses of their own selection. Neither of these other roads had given a preference to Merchants, and none of the three was acting in concert with any other. The Commission, adhering to its ruling in the *McCormick Warehouse* case, held that the designated warehouses were in truth not public freight stations, however the carriers might style them. From this it followed that allowances and special privileges accorded on the footing of an agency relation would have to be abandoned. *Gallagher* v. *Pennsylvania R. Co.*, 160 I. C. C. 563. The railroads were required to cancel any tariff provisions whereby "the facilities of the contract warehouses" were made "a part of the respective station facilities" of the lines affected by the order. They were required to "cease and desist" from publishing or making the discriminatory privileges and allowances growing out of the attempt to treat the warehouse companies as agents. On the other hand, the Commission refused an award of reparation. "The evidence is far too vague and indefinite to warrant the conclusion that complainants have suffered actual pecuniary loss attributable directly to the alleged unlawful practices."

The carriers, together with Merchants and other warehouse companies interveners in the proceeding, brought suit in a federal court (three judges sitting) to vacate the order of the Commission. The bills of complaint were dismissed, one judge dissenting. 44 F (2d) 379. Upon appeal to this court the decree was affirmed. *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501. The opinion there rendered is so exact in its description of the nature and effect of the unlawful practices as to make elaboration useless now. In particular the court points out that a warehouse designated as a station was in a position to receive package freight in less than carload lots, and ship it at carload rates without charge to the customer for assembling the packages and loading them, this by reason of the fact that the warehouse had been paid by the railroad for doing that very work. To that extent it could afford to underbid competitors. For the same reason it had a position of superiority over against its rivals in unloading carload lots, for it could distribute and re[illegible]p in packages at the expense of the carrier. This advantage as [illegible] package freight, if permitted to continue, would have taken the life out of rules designed to limit the character of transportation services. By rule 23 of the Consolidated Freight Classi-

fication a carrier may not distribute carloads of freight in less than carload lots, nor assemble smaller lots into carloads. 283 U. S. at p. 510. Thus the opinion makes it clear that the whole system of warehouse stations, with its payments and allowances, including the incidental saving of demurrage, had been built upon a false foundation. Adherence to the statute called for its suppression.

We have seen that Terminal asked for reparation as well as for a restraining order at the hands of the Commission. There is no doubt that the Commission had jurisdiction in response to that request to make an award against the railroad for damages suffered by the complainant as a result of the unlawful practices. 49 U. S. C., §§ 8, 9, 16 (1), (2); *Interstate Commerce Commission* v. *United States*, 289 U. S. 385; *Louisville & Nashville R. Co.* v. *Ohio Valley Tie Co.*, 242 U. S. 288; *Pennsylvania R. Co.* v. *Jacoby & Co.*, 242 U. S. 89; *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412; *Pennsylvania R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184. The Commission found, however, that no damages had been proved, and its ruling as to that was final, not subject to review by this court or any other. *Interstate Commerce Commission* v. *United States, supra*, at p. 388; *Baltimore & Ohio R. Co.* v. *Brady*, 288 U. S. 448; *Standard Oil Co.* v. *United States*, 283 U. S. 235; *Alton R. Co.* v. *United States*, 287 U. S. 229; *Procter & Gamble Co.* v. *United States*, 225 U. S. 282. True, the complainant might have confined itself to a request for a restraining order, and after thus invalidating the preference have asked a court for reparation. 49 U. S. C., § 9. It had a choice, in other words, between a remedy at the hands of the Commission and a remedy by suit, but by express provision of the statute it could not have them both. *Baltimore & Ohio R. Co.* v. *Brady, supra.* Reparation under the Commerce Act was thus permanently barred by the ruling of the Commission as against the offending carrier. The situation was altogether different, however, in respect of the liability of Merchants and other aiders and abettors. As to wrongdoers other than the carrier the complainant had not asked the Commission to fix the quantum of the damages, thus relieving us of the duty to inquire whether jurisdiction would have existed if such relief had been demanded. 49 U. S. C., §§ 9, 16 (1), and compare 49 U. S. C., § 42. Merchants would not have been affected by an award of reparation if the Commission had found the evidence sufficient for that relief, and it gains nothing from the fact that reparation was refused. In

saying this we are not unmindful that it intervened in the proceeding. It was interested in the event, for it would be harmed by a restraining order. 49 U. S. C., § 42. Intervention, though permitted, did not broaden the complaint, nor add to the range of enumerated powers. Accordingly the framers of the statute were careful to provide that aiders and abettors should not go unwhipped of justice. In a suit under the Commerce Act, all persons soliciting or procuring the allowance of a forbidden preference were to be liable, jointly or severally, to make good the damage suffered. 49 U. S. C., § 10 (4).* Cf. 49 U. S. C., § 41 (3). Here was an ample remedy to reach a guilty participant in an unlawful discrimination, whether reparation against the carrier had been granted or refused.

Petitioner, not satisfied to proceed under the Commerce Act, put that remedy aside and brought suit under the Sherman and Clayton Acts, hoping by that manoeuvre to charge both carrier and warehouse, and to charge them with treble damages. Every act of wrongdoing proved in the new suit to have been committed by the defendants was proved against them also (with unsubstantial exceptions) in the case before the Commission. Now as before, the head and front of their offending is the use of the warehouses as stations for the carrier with the allowances and privileges, such as exemption from demurrage, growing out of that relation. What is true of the offense is true also of its consequences. There has been no proof of any loss that would not be provable in equal measure in proceedings under the Commerce Act upon a claim for reparation. *Interstate Commerce Commission* v. *United States, supra; Louisville and Nashville R. Co.* v. *Ohio Valley Tie Co., supra.*

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*"*Inducing unjust discrimination; penalty; liability for damages.* If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce any common carrier subject to the provisions of this chapter, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding $5,000, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom."

Terminal does not show that there was a conspiracy to establish a monopoly either of transportation by Pennsylvania or of storage by Merchants, much less that a monopoly was actually attained. There was no monopoly of transportation, for the statistics make it plain that the competing lines in Philadelphia had a large percentage of the business of carrying storage freight. Moreover, Terminal is not here as the representative of the railroads, and may not vindicate their grievances, if grievances there are. More important is the consideration whether there has been a monopoly of storage. There are many warehouses in Philadelphia for the storage of railroad freight. Neither Merchants nor any other company has been able to engross the business or has even attempted to engross it. During the years of the unlawful practices, Merchants' business declined proportionately to the whole, and Terminal's increased, as did also that of other warehouses, so far as the record supplies us with the relevant statistics. Indeed, petitioner does not even claim that by reason of the defendants' acts, it failed to get business that would otherwise have come to it. If there was any claim for such damages at the beginning it was explicitly renounced. What petitioner contends and has contended for is this and nothing more, that to hold and attract customers it had to keep its charges down below the normal rate, diminishing its profit to the extent of the reduction. In a word, its only damages are those resulting, in its view, from the allowances for loading and unloading or like discriminatory acts, and not from any conspiracy transcending these particulars, a conspiracy of which allowances and privileges are a symptom or an incident.

Upon the basis of that evidence the trial judge left it to the jury to say whether Terminal was a sufferer from an unlawful combination in restraint of trade and commerce. The jury found a verdict for $136,125 against both defendants. This verdict was trebled by the court, with the addition of a counsel fee ($27,000), the whole judgment thus amounting to $437,338.81. There was an appeal to the Circuit Court of Appeals for the Third Circuit where the judgment was reversed. The ground of the reversal was that the decision of the Commission refusing reparation was a bar to any claim for damages against either of the defendants in a suit under the Anti-Trust laws as well as under the Commerce Act. 78 F (2d) 591. This court granted a writ of certiorari to determine the scope and operation of important acts of Congress.

The order of the Commission denying reparation, though it be assumed to be conclusive evidence in favor of the carrier, is plainly not such evidence for the carrier's confederate. We think it better to rest our judgment on grounds applicable to both defendants. Whether such grounds exist is the question next in order.

First: Discriminatory privileges and payments given by a carrier to a consignor or consignee are unavailing without more to make out a combination in restraint of trade or commerce within the meaning of the Anti-Trust Laws. To lead to that result the privileges or payments must be the symptoms or incidents of an enveloping conspiracy with its own illegal ends. In the absence of such a showing a sufferer from discriminatory charges and allowances has his remedy under the Commerce Act for any damage to his business, and that remedy is exclusive against all the parties to the wrong.

Two cases in this court, though not indeed decisive, are apposite and helpful. The first, *Keogh* v. *Chicago & Northwestern Railway Co.*, 260 U. S. 156, was a suit under the Anti-Trust Laws against railway companies and others who were charged to have combined in establishing uniform rates and thus destroying competition, all to the plaintiff's damage. True the rates had been approved after complaint to the Commission, but this was not enough, or Keogh so contended. He was entitled in his view to the benefit of competitive rates, quite apart from any finding that the rates established by concerted action were reasonable in amount and without discriminatory effect. In upholding a dismissal of the suit, the court called attention to the provisions of the Commerce Act whereby a remedy in damages was given for rates illegally exacted. "If the conspiracy here complained of had resulted in rates which the Commission found to be illegal because unreasonably high or discriminatory, the full amount of the damages sustained, whatever their nature, would have been recoverable in such proceedings. *Louisville & Nashville R. Co.* v. *Ohio Valley Tie Co.*, 242 U. S. 288. Can it be that Congress intended to provide the shipper, from whom illegal rates have been exacted, with an additional remedy under the Anti-Trust Act? See *Meeker* v. *Lehigh Valley R. Co.*, 162 Fed. 354. And if no remedy under the Anti-Trust Law is given where the injury results from the fixing of rates which are illegal because too high or discriminatory, may it be assumed that Congress intended to give such a remedy where,

as here, the rates complained of have been found by the Commission to be legal and while in force had to be collected by the carrier." 260 U. S. at p. 162. These queries were coupled with a warning of the practical inconvenience attendant on any answer different from the one that they suggest. "If a shipper could recover under § 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors." *Id.* at 163.

A second case pointing the same way is *United States Navigation Co., Inc.* v. *Cunard Steamship Co., Ltd.*, 284 U. S. 474. The suit was for an injunction under the Sherman Anti-Trust Act and the Clayton Act to restrain a group of steamship companies from continuing a conspiracy in restraint of trade and commerce. The acts charged to be illegal fell within the express prohibitions of the Shipping Act of 1916 as amended, or were in effect, even if not in terms, a component part thereof. 284 U. S. at p. 485; 46 U. S. C., §§ 801, 812, 815, 816, 876. The decision was that the plaintiff must seek redress by application to the Shipping Board. True, the Anti-Trust Laws, since the enactment of the Clayton Act, have been explicit in providing that any one injured by an unlawful combination might have relief by injunction against threatened damage to his business. 15 U. S. C., § 26; *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443; *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Association*, 274 U. S. 37. To this there is an exception where the subject matter of the complaint is a wrong within the jurisdiction of the Interstate Commerce Commission, in which case an injunction, if granted, must be at the instance of the government. 15 U. S. C., § 26; *Central Transfer Co.* v. *Terminal Railroad Association of St. Louis*, 288 U. S. 469, 474. The exception does not apply, at all events in terms, to wrongs within the jurisdiction of any other board. Even so, the right to sue, however explicit on its face, was held to have been partially superseded in respect of private suitors by the adoption of the Shipping Act, which as to transactions within its range gave the only remedy available. The conclusion was reinforced by a reference to Keogh's case and to the need for a uniformity difficult of attainment when jurisdiction is divided.

What was said in these opinions is precisely applicable here. If a sufferer from the discriminatory acts of carriers by rail or by

water may sue for an injunction under the Clayton Act without resort in the first instance to the regulatory commission, the unity of the system of regulation breaks down beyond repair. *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U. S. 452; *Robinson* v. *Baltimore & Ohio R. Co.*, 222 U. S. 506; *Northern Pacific R. Co.* v. *Solum*, 247 U. S. 477, 483; *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291; and see 15 U. S. C., § 26, construed in *Central Transfer Co.* v. *Terminal Railroad Association, supra.* On the other hand, if the regulatory commission has issued a "cease and desist" order, an injunction under the Clayton Act is inappropriate and needless. 49 U. S. C., § 16 (7), (8), (12). The same considerations are applicable, and with undiminished force, where the suit under the Clayton Act is not for an injunction but for damages. There too a finding of undue discrimination by the regulatory board is a necessary preliminary to a suit against the carrier. See cases *supra.* Certain then it is that the Anti-Trust Laws are inapplicable in all their apparent breadth to carriers by rail or water. A consignor or consignee aggrieved by such a wrong must resort to the appropriate administrative agency, at least for many purposes. If he is remitted to the Commerce Act or the Shipping Act to cancel the illegal preference, may he plead over those acts and revert to the Clayton or the Sherman Act for the purpose of recovering damages? The Commerce Act like the Shipping Act embodies a remedial system that is complete and self-contained. It provides the means for ascertaining the existence of a preference, but it does not stop at that point. As already shown in this opinion, it gives a cause of action for damages not only against the carrier, but also against shippers and consignees who have incited or abetted. For the wrongs that it denounces it prescribes a fitting remedy which, we think, was meant to be exclusive. If another remedy is sought under cover of another statute, there must be a showing of another wrong, not canceled or redressed by the recovery of damages for the wrong explicitly denounced. The opinions of this court in their fair and natural extension point to that conclusion. *Keogh* v. *Chicago & Northwestern Railway Co.*, *supra*; *United States Navigation Co.* v. *Cunard Steamship Co.*, *supra.* The opinions of other federal courts point the same way with equal, if not greater certainty. *United States Navigation Co.* v. *Cunard S. S. Co.*, 50 F.

(2d) 83, 86, 89, reviewing the decisions; *Meeker* v. *Lehigh Valley R. Co.*, 162 Fed. 354, 363; *United States* v. *Atchison, T. & S. F. Ry. Co.*, 142 Fed. 176, 184, 185; *Glenn Coal Co.* v. *Dickinson Fuel Co.*, 72 F. (2d) 885, 888. We follow these signposts to the goal they seem to mark.

In thus holding we do not intimate that never in any circumstances can a carrier become a party to a conspiracy in restraint of trade or commerce with liability for treble damages. This has been made plain already. We enlarge on it for greater certainty. Wherein the case is now deficient will be made clearer by example. One may suppose a business of a manufacturer which has assumed the form and size of a monopoly, or if not already at that stage, is well upon the road thereto. Cf. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 51, 61; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *United States* v. *United States Steel Corp.*, 251 U. S. 417; *United States* v. *Swift & Co.*, 286 U. S. 106, 116. One may add a situation in which a carrier has knowingly confederated with the owner to preserve such a business or foster it. Whatever liability grows out of that alliance is untouched by this decision. For present purposes we may assume that if such a situation should develop, the carrier would make itself a participant in the monopoly which it had conspired to produce, though its only overt act was a discriminatory rate of carriage. Again, a group of manufacturers, whose business in combination would not amount to a monopoly, might unite among themselves to lay a burden upon commerce by concerted action as to prices. *Swift & Co.* v. *United States*, 196 U. S. 375; *United States* v. *American Linseed Oil Co.*, 262 U. S. 371; *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600. If a carrier were to give a preference in furtherance of that conspiracy, it would become a participant therein, or so we may assume, the damages being measured not merely by the consequences flowing from the preference, but by those flowing from the conspiracy in all its comprehensive unity.

None of these assumptions affects the case at hand. For reasons already stated there was no conspiracy to monopolize the storage business to the destruction of Terminal or of others similarly situated. There was no conspiracy to impose upon that business a burden of any kind, except to the extent that the enjoyment of a preference might increase the opportunities for profit of the ware-

house so preferred. Of any combination more far-reaching, more inclusive in its aims, there is silence in the record after every reasonable inference had been drawn from its pages. On the contrary, the history of the relation between Pennsylvania and Merchants indicates strongly that the illegal discrimination, far from being a symptom of a larger combination, was the product of a mistake of law, which was shared for many years by the regulatory commission till the decision in McCormick's case laid down another rule. The mistake does not relieve the carrier from liability for the concession of a privilege which has turned out to be forbidden. It serves, however, as a reminder that the liability must be kept within reasonable limits, and that a preference innocent in purpose should not be magnified into a token of a circumambient conspiracy.

We conclude that for Merchants as well as for Pennsylvania whatever liability was incurred through the forbidden discrimination was under the act to regulate commerce and not for treble damages.

Second: The case having been submitted to the jury on the theory that apart from the unlawful preference there was evidence of a conspiracy in restraint of trade and commerce, and the complaint having been framed on that theory and no other, the suit should have been dismissed as to each of the defendants.

The judgment of the Court of Appeals reversing the judgment of the District Court is accordingly

Affirmed.

Mr. Justice McReynolds concurs in the result.

Mr. Justice Roberts took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.